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INTRODUCTION

Over the past generation, the Supreme Court has applied its justiciability doctrines with increasing stringency. Initially, a plaintiff must establish standing by showing that a defendant has personally injured her. Furthermore, the case must be ripe (*i.e.*, well-developed factually and legally) but not moot (*i.e.*, irrelevant because the parties' dispute has ended). Finally, the question presented cannot be "political," but instead must be capable of "judicial" resolution. When a party lacks standing, presents an unripe or moot claim, or raises a political question, a federal court's rendering of a decision would be a forbidden "advisory opinion."

According to the Burger and Rehnquist Courts, these justiciability doctrines "define with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded," and thus demonstrate "'concern about the proper—and properly limited—role of the courts in a democratic society.'"[1] In the Court's view, justiciability principles implement the Framers' vision of constitutional democracy by requiring unelected federal judges to leave Congress and the President undisturbed—even when they are allegedly violating the law—unless they happen to injure someone whose dispute with the government is deemed sufficiently vigorous, mature, and nonpolitical.[2]

The Court has candidly admitted that its conception of separation of powers and justiciability is "more than an intuition but less than a rigorous and explicit theory,"[3] as if the point were so obvious as

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1 Allen v. Wright, 468 U.S. 737, 750 (1984) (O'Connor, J.) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975) (Powell, J.)). Other Justices have written opinions for the Court emphasizing that justiciability reflects the Founders' understanding of separation of powers. *See, e.g.*, Reno v. Catholic Social Servs., 509 U.S. 43, 56-59 (1993) (Souter, J.); Northeastern Fla. Chapter of the Assoc. Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 663-64 (1993) (Thomas, J.); Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60, 576-77 (1992) (Scalia, J.); Renne v. Geary, 501 U.S. 312, 316-24 (1991) (Kennedy, J.); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471-76 (1982) (Rehnquist, J.); United States v. Richardson, 418 U.S. 166, 171-80 (1974) (Burger, C.J.); Sierra Club v. Morton, 405 U.S. 727, 731-40 (1972) (Stewart, J.). *See infra* part II for analysis of these cases.

2 *See infra* part II.A.

3 *Allen*, 468 U.S. at 750.

to require no further elaboration. This approach reflects unquestioning fealty to Justice Felix Frankfurter, who almost singlehandedly developed the modern justiciability doctrines during the middle of this century. Based on slender evidence, Frankfurter asserted that these doctrines were rooted in the Constitution's history and underlying political philosophy, which incorporated English beliefs about the judiciary's appropriate function.[4]

Like the Court, commentators have failed to provide a rigorous theory of justiciability built upon the Founders' ideas. Indeed, the most influential modern scholar, Alexander Bickel, consciously disregarded history in arguing that the Court should manipulate the justiciability doctrines to minimize judicial review, "a deviant institution in the American democracy."[5] Other defenses of the Court's position, including an important essay by then-Judge Scalia, have reiterated Justice Frankfurter's claim that justiciability preserves the judiciary's circumscribed role in our democratic system of tripartite governmental powers.[6] Critics of the orthodox wisdom, most notably Erwin Chemerinsky and Martin Redish, have responded that justiciability undermines separation of powers by restricting or barring the exercise of judicial review—the principal control against unconstitutional action by the political branches.[7]

No scholar, however, has analyzed justiciability comprehensively in light of Federalist separation-of-powers concepts. This intellectual

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4 *See infra* part II.A.2.b (discussing Justice Frankfurter's major justiciability opinions).

5 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 18 (1962).

6 *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 890-99 (1983).

7 Professor Chemerinsky's theme is that the authoritative interpreter of the Constitution should be the federal judiciary, whose independence and principled decisionmaking process make it the institution best able to protect fundamental constitutional values from majoritarian pressures. ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 1-24, 86-97 (1987) [hereinafter CHEMERINSKY, INTERPRETING]. He correctly contends that the justiciability doctrines undercut judicial review by allowing the elected branches to be the final expositor of constitutional provisions designed to regulate their own conduct. *Id.* at 97-105. However, Chemerinsky discusses the Framers' ideas only briefly, *id.* at 7-8, 27-29, and indeed discounts the relevance of originalist evidence. *Id.* at 17-23, 49-80, 112-17.

Professor Redish maintains that justiciability weakens the "Countermajoritarian Principle" fundamental to our limited constitutional democracy, which requires judicial review by independent federal courts so that the majoritarian branches will not be the final judge of the restrictions the Constitution imposes upon them. MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 4-6, 75-100, 103-09, 121, 124-26, 131-39 (1991). Redish also stresses, however, that federal courts are confined to a "judicial" function, which he defines as the resolution of a live dispute. *Id.* at 5, 88-90, 104. Much of Redish's book has separation-of-powers implications, which he sometimes makes explicit in insightful passages. *See, e.g., id.* at 92-97. He does not, however, exhaustively examine justiciability from the perspective of Federalist separation-of-powers theory and early judicial decisions. My analysis of those historical materials leads me to diverge from Redish on several points, even though I agree with many of his conclusions (particularly about standing). *See generally infra* part II.

void is surprising, given the massive body of case law and literature that considers justiciability[8] and separation of powers[9] as discrete topics. This Article fills that gap by offering a "Neo-Federalist" approach, which aims to (1) recapture the understanding of the Constitution's text, structure, and political theory held by leading Federalists such as James Wilson,[10] James Madison,[11] and Alexander Hamilton;[12] and (2) apply those aspects of their philosophy that retain vitality in addressing modern legal problems.[13]

Part I discusses the Federalist idea of justiciability in America's constitutional framework of separated powers. Federalists accepted the English doctrine that separation of powers promoted efficient government yet also preserved liberty by checking and balancing governmental authority and by securing the "rule of law" (*i.e.*, the impartial administration of justice). However, Federalists transformed this theory by linking it with their novel proposition that all government officials, including judges, were representatives of the sovereign People.

In the Constitution, the People divided their government into three coordinate departments and delegated to each certain powers. Thus, as compared to the political branches, the judiciary was neither

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8 The major decisions and scholarship on the justiciability doctrines will be discussed *infra* part II.

9 Over the past 15 years, separation-of-powers cases outside the justiciability context have increased exponentially. *See infra* notes 292, 368 (summarizing decisions). These cases have sparked substantial commentary, which will be examined throughout this Article.

10 Although neglected by posterity, Wilson was "the most learned and profound legal scholar of his generation." 1 THE WORKS OF JAMES WILSON 2 (Robert G. McCloskey ed., 1967) [hereinafter WILSON'S WORKS]; *see also* 1 *id.* at 24, 28-29, 37. Wilson developed the earliest version of the argument used to justify the Declaration of Independence (which he signed), joined with Madison in dominating the Constitutional Convention, convinced Pennsylvania to ratify the Constitution, became the nation's first law professor, delivered the most important lectures on American law in the 18th century, and served as one of the original Supreme Court Justices. *Id.* at 2, 45.

11 Of particular relevance are Madison's essays on separation of powers. *See* THE FEDERALIST Nos. 47-51 (James Madison).

12 Hamilton's explanation of the role of federal courts in the constitutional system is especially pertinent. *See* THE FEDERALIST Nos. 78-82 (Alexander Hamilton).

13 For a detailed description and justification of this methodology, see Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 207-08 n.7, 208-09 n.9, 230-31 n.86 (1985) [hereinafter Amar, *Neo-Federalist*]; Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426 n.9 (1987) [hereinafter Amar, *Sovereignty*]; *see also* BRUCE ACKERMAN, WE THE PEOPLE 19-20, 34-57, 165-67 (1991) (arguing that the Founding period remains meaningful as a source of timeless constitutional values and insights, despite enormous social, economic, political, and moral differences between the 18th and 20th centuries).

I have adopted a Neo-Federalist approach to illuminate two distinct but related themes. First, the modern Court has purported to adhere to the Framers' intent about justiciability and separation of powers, but has gotten its history wrong. Second, although the Federalists' design may not legally bind the current Court, and although certain details of their scheme have become outmoded, their fundamental ideas have an internal logic and consistency that can help clarify the confused justiciability doctrines.

inferior nor uniquely limited. Like Articles I and II, Article III simultaneously granted and restricted authority: Federal courts were to exercise "judicial power" (*i.e.*, the interpretation and application of preexisting legal rules to particular facts) in nine specified categories.

Moreover, judges were not antidemocratic merely because they were appointed rather than elected. On the contrary, the People deliberately removed the judiciary from majoritarian pressures to give it the independence needed to uphold the People's fundamental law, the Constitution. Far from being a "deviant institution," judicial review was essential to safeguard our system of separated powers. The rule of law presumed that Congress and the President could not impartially determine whether they had complied with constitutional provisions that limited their own powers. Similarly, checks and balances could be maintained only if courts prevented the political branches from exceeding their constitutional bounds.

Therefore, under Federalist theory, separation of powers would be violated if federal courts refused to exercise the authority constitutionally conferred on them.[14] But it would be equally subverted if judges arrogated power not granted, for doing so would flout the rule of law, disrupt governmental efficiency, and lead to judicial tyranny. To distinguish cases falling within its jurisdiction from matters beyond the scope of "judicial power," the early Supreme Court—dominated by Federalists like James Wilson, John Jay,[15] James Iredell,[16] and John Marshall[17]—developed three main justiciability doctrines. First, the political departments could not require Article III courts to render advice outside the context of a lawsuit. Second, federal judges could not consider legal questions committed by the Constitution to the discretion of Congress or the President. Third, when a court decided a nonpolitical question in a litigated case, its judgment could not be

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14 Several commentators have argued that separation of powers warrants judicial deference to congressional grants of standing, albeit on policy rather than historical grounds. *See, e.g.*, David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37; Jonathan Poisner, Comment, *Environmental Values and Judicial Review After* Lujan: *Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335 (1991).

15 Jay, the first Chief Justice, significantly influenced the Constitution's ratification (*e.g.*, writing THE FEDERALIST Nos. 2-5 and 64) and was a preeminent figure in foreign affairs. *See* 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 5-7 (Maeva Marcus & James R. Perry eds., 1985) [hereinafter DOCUMENTARY HISTORY].

16 In 1783, Iredell became the first lawyer to persuade a state supreme court that judges had the right to enforce constitutions as fundamental law against contrary legislative acts. Iredell led the Federalist ratification effort in North Carolina and was the youngest of the early Justices. *See* 1 DOCUMENTARY HISTORY, *supra* note 15, at 62-63.

17 Although Marshall played a minor role in the Virginia Ratification Convention, he presented one of the most eloquent defenses of the federal judiciary. *See* 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 551-62 (1901). His contributions as Chief Justice are inestimable.

reviewed by the majoritarian branches. These rules of justiciability and separation of powers endured for over a hundred years.

Part II examines the erosion of the traditional approach in this century and argues that reintroducing Federalist principles would clarify analysis. The Court has gradually come to view elected officials as the only representatives of the People. This distortion of popular sovereignty is a legacy of the New Deal's exigent embrace of the Progressive recommendation that America adopt the British model of decisive, centralized legislative–executive rule. To facilitate such efficient government, the Court has largely insulated the political departments' actions from "antidemocratic" judicial scrutiny by altering the justiciability doctrines to decrease access to federal courts.

Although efficiency is one classical objective of separation of powers, it must be balanced against the competing aims of promoting liberty, ensuring the rule of law, and enforcing checks and balances. The modern Court, however, has discounted the latter goals because it does not recognize the Federalist ideas they reflect: that federal judges represent the People; that judicial power must be commensurate with legislative and executive authority; and that judicial review must be exercised to remedy political branch conduct that transgresses constitutional limits. To better account for these Federalist principles, the Court should reformulate the standing, mootness, ripeness, and political question doctrines according to the detailed guidelines set forth in Part II.

I
THE FEDERALIST CONCEPTION OF SEPARATION OF POWERS AND JUSTICIABILITY

The Federalist Court's seminal justiciability opinions—*Marbury v. Madison*,[18] *Hayburn's Case*,[19] and the *Correspondence of the Justices*[20]—presuppose familiarity with the Constitution's underlying theory, which adapted English separation-of-powers concepts to the American idea of popular sovereignty. The modern Court has based its justiciability doctrines upon these three decisions but has misread them, primarily because it has failed to grasp their theoretical foundation. To appreciate just how far the Court has departed from the Founders' design, it is necessary first to examine how Federalist principles

18 5 U.S. (1 Cranch) 137 (1803). *See generally infra* part I.C.3 (analyzing *Marbury*).

19 2 U.S. (2 Dall.) 409 (1792). *See generally infra* part I.C.1 (examining *Hayburn's Case*).

20 Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488-89 (Henry P. Johnston ed., 1890) [hereinafter JAY PAPERS]. *See generally infra* part I.C.2 (discussing this correspondence).

emerged from a century-and-a-half of intellectual ferment in England and America.

A. The Pre-Constitutional Background

1. *English Separation-of-Powers Theories*

English political theorists developed the idea that governmental power should be divided and that different people should exercise the major governmental functions.[21] Separation of powers was first mentioned during the 1640s,[22] became a major tenet for Locke a half-century later,[23] and then underwent continual refinement that culminated in Montesquieu's work.[24] These men defined the powers of government and explained why they had to be partitioned.

a. *Basic Governmental Functions*

British theorists located "sovereignty"—absolute, indivisible, and final lawmaking authority—in the People only during revolutions. Once citizens had consented to a new government, sovereignty revested in the "King-in-Parliament."[25] Not surprisingly, governmental

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21 This section presents a simplified version of pre-19th century English separation theory. For more detailed accounts, see W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS (1965) [hereinafter GWYN, MEANING]; M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 1-118 (1967).

22 *See, e.g.*, CHARLES DALLISON, THE ROYALISTS DEFENCE 80 (1648) ("[W]hilst the Supremacy, the Power to Judge the Law, and the *Authority* to make new Lawes, are kept in *severall hands*, the known Law is *preserved*, but united, it is *vanished*, instantly thereupon, and *Arbitrary* and *Tyrannicall* power is introduced."); CLEMENT WALKER, RELATIONS AND OBSERVATIONS, HISTORICAL AND POLITICK UPON THE PARLIAMENT BEGUN ANNO DOM. 1640 (1648), *reprinted in* Max Radin, *The Doctrine of the Separation of Powers in Seventeenth Century Controversies*, 86 U. PA. L. REV. 842, 855 (1938) ("[F]or any one man, or any Assembly, Court, or Corporation of men . . . to usurp[ ] these three powers: 1. The Governing power. 2. The Legislative power. 3. And the Judicative power, into themselves, is to make themselves the highest Tyrants, and the people the basest slaves in the world; for to govern supremely by a Law made, and interpreted by themselves according to their own pleasure, what can be more boundlesse and arbitrary?").

23 JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1960) (1698). For analysis of Locke's theories, see GWYN, MEANING, *supra* note 21, at 66-81; VILE, *supra* note 21, at 51-67, 79, 86-87, 95-96.

24 *See* BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Franz Neumann ed. & Thomas Nugent trans., 1949) (1748). For discussion of Montesquieu, see GWYN, MEANING, *supra* note 21, at 100-28; VILE, *supra* note 21, at 76-97.

25 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *44-52, 147-55, 160-62, 185-86; LOCKE, *supra* note 23, ch. XIX, ¶¶ 221, 241, 243. Under Lockean theory, the People collectively formed a social compact and consented to a government, but retained the right to dissolve that government if it breached the People's trust. Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 57-61, 92-94 (1985). Absent a revolution, however, the government was "the virtual embodiment of the abstract sovereignty of the People." Amar, *Sovereignty*, *supra* note 13, at 1430-31, 1435-36; *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 346-48 (1969).

power was classified in terms of the activities of the Crown and Parliament.[26] "Legislative" power consisted of enacting, amending, or repealing general rules of conduct[27]—most importantly, laws governing taxation and spending.[28] "Executive" power included not merely the ministerial task of carrying out statutes,[29] but also broad discretionary authority[30]—for example, to conduct foreign affairs[31] and to appoint and direct civil and military officers.[32]

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26 *See* VILE, *supra* note 21, at 28-29; William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263, 266 (1989) [hereinafter Gwyn, *Indeterminacy*]. For statements of this dualist approach, see, e.g., LOCKE, *supra* note 23, ch. XIV, ¶ 159 ("[T]he Legislative and Executive Power are in distinct hands . . . in all . . . well-framed Governments."); MARCHAMONT NEDHAM, THE EXCELLENCIE OF A FREE-STATE (1656), *reprinted in* GWYN, MEANING, *supra* note 21, app. 1, at 131 ("In the keeping of these two Powers distinct . . . consists the safety of a State.").

27 *See, e.g.*, MONTESQUIEU, *supra* note 24, bk. XI, ch. 6, at 153 (explaining that the legislature enacts laws declaring the "general will of the state"); NEDHAM, *supra* note 26, app. 1, at 131 ("Legislative Power" consists of "making, altering, or repealing Laws . . . ."). *See generally* VILE, *supra* note 21, at 24-27, 44, 59, 95-96 (examining the origins of the concept of legislative power); 10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 412-14 (1938).

28 *See, e.g.*, MONTESQUIEU, *supra* note 24, bk. XI, ch. 6, at 160 ("[T]he raising of public money . . . [is] the most important point of legislation."); JOHN TRENCHARD, SHORT HISTORIE OF STANDING ARMIES IN ENGLAND (1698), *reprinted in* GWYN, MEANING, *supra* note 21, app. 3, at 138 (noting that the legislature has the "sole Power of giving Mon[e]y"); GWYN, MEANING, *supra* note 21, at 93-94 (citing Henry Bolingbroke to similar effect). Legislative power was supreme, *see, e.g.*, LOCKE, *supra* note 23, ch. XIII, ¶ 150, meaning that its function had to be exercised before the executive could act—not that legislative power was unrestrained or could interfere with executive power. *See* VILE, *supra* note 21, at 63-64, 95-96. The Constitution incorporated English ideas about legislative power—including the equation of "legislative supremacy" with "primacy in time." *See infra* notes 107-08, 115 and accompanying text.

29 *See, e.g.*, LOCKE, *supra* note 23, ch. XII, ¶ 144 (referring to the executive's "Execution of the Laws"); MONTESQUIEU, *supra* note 24, bk. XI, ch. 6, at 152 ("Executive power" means "executing the public resolutions."); NEDHAM, *supra* note 26, app. 1, at 131 (defining "Executive Power" as "administration of Government, in the Execution of Laws"); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 605-06 (1994) (Historically, the core meaning of "executive power" was the authority to execute the law.).

30 *See, e.g.*, GWYN, MEANING, *supra* note 21, at 93-94 (The king "'is entrusted with the executive Power; and several other Powers and Privileges, which we call Prerogatives . . . .'") (quoting HENRY BOLINGBROKE, THE CRAFTSMAN 12 (1730)); LOCKE, *supra* note 23, ch. XIV, ¶¶ 159-60, 166 (stating that prerogatives included discretion to act in the public good, without specific legal authority). In exercising such powers, the King was not "in Parliament," but wholly independent.

31 Locke distinguished this discretionary "federative" power over foreign affairs (*e.g.*, to make war and peace) from the ministerial "executive" power to administer statutes, even though both powers were exercised by the executive. *See* LOCKE, *supra* note 23, ch. XII, ¶¶ 144-48, 153; *see also* MONTESQUIEU, *supra* note 24, bk. XI, ch. 6, at 151 (to similar effect). For discussion of Locke's and Montesquieu's taxonomy of executive power, see GWYN, MEANING, *supra* note 21, at 101; VILE, *supra* note 21, at 60-61, 86.

32 Executive power also encompassed regulating national commerce, coining money, and pardoning criminals. *See* GWYN, MEANING, *supra* note 21, at 28-29; *see also infra* notes 111, 168-70 and accompanying text (describing how Federalists authorized Congress to share in most "executive" prerogatives).

Furthermore, executive power extended to judicial processes—including the King's Bench's discretionary issuance of the prerogative writs of prohibition, certiorari, mandamus, and quo warranto at the request of any citizen who claimed that the government's conduct was illegal.[33] Despite the absence of a distinct judicial *power*, courts were independent[34] and had a discrete *function*[35]—the application of pre-existing law to a particular set of facts.[36] This function was exercised both in common law cases[37] and in actions brought under either prerogative writs or informer and relator statutes, which authorized citizens to enforce public rights even if they had no personal stake in a matter.[38] Judicial proceedings were open, and judges had to give reasons for their decisions.[39]

b. *Justifications for Separation of Powers*

By the end of the seventeenth century, three main rationales had been developed for separation of powers. One was efficiency: Because

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33 *See* VILE, *supra* note 21, at 28-30. Writs of prohibition and certiorari restrained lower courts (and other executive officials) from proceeding in excess of their jurisdiction. *See* Raoul Berger, *Standing to Sue in Public Actions: Is It A Constitutional Requirement?*, 78 YALE L.J. 816, 819-22 (1969) (citing Coke and Holt). Mandamus compelled a government official to do a particular act that he was under a legal duty to perform. *Id.* at 824-25 (citing Blackstone, Coke, and Mansfield). Finally, a quo warranto action vindicated the general public interest in the enforcement of statutes. *Id.* at 823; *see also* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1396-98 (1988) (discussing prerogative writs).

34 The Act of Settlement, 12 & 13 Will. III, c. 2 (1701), guaranteed judicial independence. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *268 (praising such independence as the key to impartial justice). For analysis of the evolution of judicial independence, see GWYN, MEANING, *supra* note 21, at 5-7; 10 HOLDSWORTH, *supra* note 27, at 644-50; VILE, *supra* note 21, at 54.

35 *See, e.g.*, GWYN, MEANING, *supra* note 21, at 101-103; VILE, *supra* note 21, at 87-88.

36 *See, e.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES *380. The judge's role was "only to *declare* and *pronounce*, not to *make* or *new-model*, the law." 3 *id.* at *327. *See generally* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 474-75 n.140, 477-78 (1994) (citing 17th and 18th century sources describing the judicial function of expounding existing law). English courts also had equitable power to construe statutes non-literally if consistent with the spirit and reason of the law. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *62. Finally, they had power to make their own procedural rules. *See* 10 HOLDSWORTH, *supra* note 27, at 221.

37 *See* Pushaw, *supra* note 36, at 477-79.

38 Informers alleged violations of criminal or regulatory statutes (regardless of whether those laws were being applied to them), usually to obtain a financial share of the penalty imposed on the wrongdoer. Relator actions enabled citizens with no personal stake in a matter of general public interest (*e.g.*, the administration of a public trust) to prosecute as private attorneys general. *See* Berger, *supra* note 33, at 825-26 (citing sources); Winter, *supra* note 33, at 1398-99, 1406.

39 *See, e.g.*, FRANCIS BACON, A TREATISE OF UNIVERSAL JUSTICE 95 (Garland Pub., 1978) (1727). The Framers accepted the English view that judges had to be independent, that their function was to interpret existing law, that judicial proceedings included common law and public actions, and that decisions had to be rendered publicly. *See infra* notes 113-14, 122, 138-40, 143, 152-54 and accompanying text.

legislators could not act with the unity, speed, and secrecy necessary to govern effectively, an executive with these attributes was required.[40] The other justifications focused on preserving liberty and avoiding tyranny.[41] First, dividing power promoted the rule of law—"a [g]overnment of [l]aws and not of [m]en."[42] To ensure that the law was impartially administered and that no official was above it, those who made the laws could not execute or judge them[43]—as reflected in the maxim "no man can be the judge of his own case."[44] The prohibi-

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40 *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *242 (The English constitution places executive power "in a single hand . . . for the sake of unanimity, strength, and dispatch."); LOCKE, *supra* note 23, ch. XIV, ¶ 160 (The legislature is "too numerous, and so too slow, for the dispatch requisite to Execution."); *id.* ch. XII, ¶¶ 142-43 (same); MONTESQUIEU, *supra* note 24, bk. XI, ch. 6, at 156 ("[G]overnment, having need of despatch, is better administered by one than by many . . . ."); NEDHAM, *supra* note 26, app. 1, at 131-33; *see also* GWYN, MEANING, *supra* note 21, at 28, 32-35, 43, 57, 75-77, 108-09, 118, 127; VILE, *supra* note 21, at 61-62; William C. Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 718-22 (1984); *see also infra* notes 109, 187 and accompanying text (describing Federalists' insistence on a unitary executive).

41 "Liberty" consisted of the rights to free movement, personal security (*i.e.*, enjoyment of life, health, and reputation), and enjoyment of property. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *129, 134, 138. Theorists assumed that government officials tended to use their power against the common interest. *See, e.g.*, MONTESQUIEU, *supra* note 24, bk. XI, ch. 4, at 150 ("[E]very man invested with power is apt to abuse it. . . ."); NEDHAM, *supra* note 26, app. 1, at 131; TRENCHARD, *supra* note 28, app. 3, at 138. For analysis of this theme, see GWYN, MEANING, *supra* note 21, at 11-27, 40-43, 128; VILE, *supra* note 21, at 61-63; WOOD, *supra* note 25, at 21-22.

42 THE OCEANA OF JAMES HARRINGTON AND HIS OTHER WORKS 240, 386 (John Toland ed., 1700); *see also id.* at 240-43 (discussing whether the English government fulfilled this maxim). Indeed, the legitimacy of government—its right to rule—depended upon its securing the rule of law. *See* GARRY WILLS, EXPLAINING AMERICA 113 (1981).

43 *See* LOCKE, *supra* note 23, ch. XII, ¶ 143 (It is "too great a temptation to humane frailty apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage. . . ."); MONTESQUIEU, *supra* note 24, bk. XI, ch. 6, at 151-52 (Where one person or group combines legislative and executive power, "the same monarch or senate [might] enact tyrannical laws, to execute them in a tyrannical manner."); NEDHAM, *supra* note 26, app. 1, at 131 ("[I]f the Law-makers . . . should be also the constant Administrators and Dispencers of Law and Justice, then (by consequence) the People would be left without Remedy, in case of Injustice . . . . [I]n all . . . [free] States . . . the Legislative and Executive Powers have been managed in distinct hands. . . ."); *see also* GWYN, MEANING, *supra* note 21, at 12-18, 35-36, 42, 52-58, 71-76, 104-13, 127-28; Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 306 (1989) (connecting the rule of law to the English concept of natural justice, which guarantees to every citizen a fair hearing by an unbiased decisionmaker); VILE, *supra* note 21, at 23-33, 49-51, 86-97.

44 *See, e.g.*, JOHN SADLER, RIGHTS OF THE KINGDOM; OR CUSTOMS OF OUR ANCESTOURS 87 (1649), *quoted in* VILE, *supra* note 21, at 45 ("[F]or if Lawmakers, be judges, of those that break their Laws; they seem to be Judge in their own cause: which our Law . . . abhorreth, so it seemeth also to forbid, both the Lawmaker, and the Judge to Execute . . . ."). *See generally* Verkuil, *supra* note 43, at 305 (discussing the development of this idea).

tion against legislative or executive revision of judicial orders was critical to preserving the rule of law.[45]

Second, separation of powers established balanced government, thereby discouraging rash or arbitrary action and encouraging consultation and cooperation.[46] Balanced government was related to the ancient theory that mixing the basic forms of government—monarchy, aristocracy, and democracy (*e.g.*, King, Lords, and Commons)—ensured stability and protected liberty.[47]

Eighteenth-century theorists like Montesquieu accepted the premise that liberty hinged on keeping government powers separated and in different hands.[48] Nonetheless, they recognized that pure separation among independent, unrestrained branches was unworkable.[49] Consequently, they argued that separation of powers must be complemented by checks and balances, whereby each department had a limited right to review and control the others' actions.[50] For example, the king could share in the legislative power by vetoing bills.[51] Conversely, Parliament could hold executive officials account-

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45 *See* WILLS, *supra* note 42, at 148-49. The finality of judicial orders was an ancient cornerstone of English law. *See, e.g.*, 6 Coke's Reports, Mich. 5 Jacobi 1 (1607), *reprinted in* PROHIBITIONS DEL ROY 281-82 (John Fraser ed., 1826) (The king appointed judges but could not interfere with their determinations.); *see also infra* notes 99, 116, 146-48, 176 and accompanying text (describing Federalists' emphasis on the rule of law, especially the need to preserve the finality of court orders).

46 *See, e.g.*, SADLER, *supra* note 44, *cited in* GWYN, MEANING, *supra* note 21, at 55-56 ("One Reason . . . [to] plac[e] the Power Legislative, Judiciall, & Executive, in 3 distinct Estates; . . . [is] so, they might be forced to Consult Often, and Much; in All they did . . . . This frequent Consultation . . . [will] prevent . . . a sudden Vote, or Act, of One House, or one Body . . . ."); *see also* GWYN, MEANING, *supra* note 21, at 55-56, 64-65, 85-87; VILE, *supra* note 21, at 53-75.

47 *See* GWYN, MEANING, *supra* note 21, at 24-25; VILE, *supra* note 21, at 23, 33-47, 51, 57, 64, 68, 72, 83-85, 98-99, 102-03, 106-08, 110-11; WOOD, *supra* note 25, at 19-20, 153, 197-98. Mixed government gives each social group a voice on political issues, whereas separation of powers divides governmental functions. *See* WILLS, *supra* note 42, at 97-100.

48 *See, e.g.*, MONTESQUIEU, *supra* note 24, bk. XI, ch. 6, at 151-52.

49 *See, e.g.*, *id.* at 158-61; 1 WILLIAM BLACKSTONE, COMMENTARIES *154 ("[T]he executive power should be a branch, though not the whole, of the legislature. The total union of them . . . would be productive of tyranny; the total disjunction of them . . . would in the end produce the same effects . . . . The legislature would soon become tyrannical, by making continual encroachments, and gradually assuming to itself the rights of the executive power.").

50 *See, e.g.*, TRENCHARD, *supra* note 28, app. 3, at 140 ("[A]ll wise Governments endeavour as much as possible to keep the Legislative and Executive Parts asunder, that they may be a check upon one another."). *See* GWYN, MEANING, *supra* note 21, at 82-99; VILE, *supra* note 21, at 93-95.

51 *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *154 ("To hinder . . . any such [legislative] encroachments, the king is himself a part of the parliament: and . . . very properly . . . [has a] share of legislation, which . . . consists in the power of *rejecting*, rather than *resolving* . . . ."); MONTESQUIEU, *supra* note 24, bk. XI, ch. 6, at 159 ("The executive power . . . ought to have a share in the legislature by the power of rejecting; otherwise it would soon be stripped of its prerogative."); TRENCHARD, *supra* note 28, app. 3, at 140-41 ("Our Government trusts the King with no part of the Legislative but a Negative Voice,

able for their administration of the laws and could exercise final judicial power to impeach and punish judges and executive officers (except the king) who had abused their authority.[52] Moreover, the upper legislative chamber, the House of Lords, could reconstitute itself as a "court" and exercise supreme appellate judicial power.[53] Finally, within the legislature, popular and aristocratic bodies checked each other.[54]

Montesquieu was the first to conceptualize "judicial power" as a distinct component of government (not merely an extension of executive authority) and thus assumed the burden of explaining why it had

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which is absolutely necessary to preserve the Executive."); *see also* GWYN, MEANING, *supra* note 21, at 111-12; VILE, *supra* note 21, at 92-94.

52 *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *155 ("[E]xecutive power is . . . checked, and kept within due bounds by the two houses through the privilege they have of enquiring into, impeaching, and punishing the conduct . . . of [the King's] evil and pernicious counsellors."); MONTESQUIEU, *supra* note 24, bk. XI, ch. 6, at 158 (The legislature may "examin[e] in what manner its laws have been executed" and may hold all executive officials accountable except the king.); *see also* GWYN, MEANING, *supra* note 21, at 16-17, 25, 31-32, 40-43, 60-64, 77-78, 82-87, 102, 112-13; VILE, *supra* note 21, at 94.

Thus, by the early 18th century, Parliament could check the executive through both ordinary oversight and impeachment. *See* RAOUL BERGER, IMPEACHMENT 97 (1973). In impeachment proceedings, the House of Commons charged an official with "high crimes and misdemeanors" (*i.e.*, political offenses that injured the entire nation); the House of Lords then exercised the judicial power of holding a trial, rendering a final judgment, and imposing an appropriate punishment (which could include imprisonment or execution). *See id.* at 7-52, 59-73.

In short, the executive and legislature would be mutually dependent because of the threat of veto or impeachment, but would be independent in exercising these extraordinary powers:

> "The *constitutional Dependency* . . . [is] that the Proceedings of *each Part* of the Government . . . are liable to be examin'd and controul'd by the *other Parts*. The *Independency* . . . [is] that the Resolutions of *each Part*, which direct these Proceedings, be taken *Independently* and without any *Influence*, direct or indirect, on the *others*. Without the *first*, each Part would be at Liberty to attempt destroying the *Ballance*, by usurping, or abusing Power; but without the *last*, there can be no *Ballance* at all."

HENRY BOLINGBROKE, THE CRAFTSMAN (1730), *quoted in* GWYN, MEANING, *supra* note 21, at 95; *see also* VILE, *supra* note 21, at 73-74, 95.

53 *See, e.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES *56 (The House of Lords is "the supreme court of judicature."); Calder v. Bull, 3 U.S. (3 Dall.) 386, 398 (1798) (Iredell, J.) ("[O]ne branch of the parliament, the House of Lords, not only exercises a judicial power, in cases of impeachment, . . . but [also] as a court of dernier resort, takes cognisance of many suits of law and in equity. . . ."); *see also* WILLS, *supra* note 42, at 148. When legislators exercised "judicial" power (*e.g.*, in determining impeachments and appeals), their orders were as final as those of a court composed of judges and thus could not be reviewed by either executive or judicial officials. *See, e.g., Calder*, 3 U.S. (3 Dall.) at 398 (Iredell, J.); *supra* note 45 (discussing the principle of the finality of court orders); *supra* note 52 (describing Parliament's independence in exercising the impeachment power).

54 *See, e.g.*, MONTESQUIEU, *supra* note 24, bk. XI, ch. 6, at 160 ("The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting."); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *155.

to be kept separate.[55] First, judicial and executive power had to be divorced to avoid a tyranny in which "the judge might behave with violence and oppression."[56] Second, if judicial power were "joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control,"[57] because decisions would reflect the judge's personal opinion rather than existing legal rules.[58]

Even if cabined, however, judicial power potentially posed the greatest threat to liberty. While the political branches formulated general rules, only judicial power—which applied that law to specific circumstances—could lead directly to a loss of freedom.[59] Therefore, it had to (1) be vested not in permanent tribunals but in temporary juries;[60] (2) follow established judicial procedures;[61] and (3) result in final judgments based on the letter of the law.[62] These strict controls would render judicial power insignificant compared to legislative and executive authority.[63]

Blackstone reiterated Montesquieu's ideas about separating judicial from executive and legislative power, but defended England's permanent, independent courts.[64] Montesquieu and Blackstone agreed

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55 MONTESQUIEU, *supra* note 24, bk. XI, ch. 6, at 152 ("There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."). *See* GWYN, MEANING, *supra* note 21, at 105-08; VILE, *supra* note 21, at 76, 82, 88-91, 96.

56 MONTESQUIEU, *supra* note 24, bk. XI, ch. 6, at 152.

57 *Id.*

58 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *269; *see also* 1 *id.* at *71; 4 *id.* at *377f.

59 *See* GWYN, MEANING, *supra* note 21, at 103; VILE, *supra* note 21, at 88.

60 The judiciary power ought not to be given to a standing senate; it should be exercised by persons taken from the body of the people at certain times of the year, and consistently with a form and manner prescribed by law, in order to erect a tribunal that should last only so long as necessity requires. By this method the judicial power, so terrible to mankind, not being annexed to any particular state or profession, becomes, as it were, invisible. People have not then the judges continually present to their view; they fear the office, but not the magistrate.

MONTESQUIEU, *supra* note 24, bk. XI, ch. 6, at 153; *see also* VILE, *supra* note 21, at 85, 89 (examining Montesquieu's proposal to grant adjudicatory power to juries).

61 *See* MONTESQUIEU, *supra* note 24, bk. VI, ch. 2, at 74; VILE, *supra* note 21, at 89-90.

62 *See* MONTESQUIEU, *supra* note 24, bk. XI, ch. 6, at 153 ("But though the tribunals ought not to be fixed, the judgments ought; and to such a degree as to be ever conformable to the letter of the law. Were they to be the private opinion of the judge, people would then live in society, without exactly knowing the nature of their obligations."); *see also* VILE, *supra* note 21, at 89.

63 *See* MONTESQUIEU, *supra* note 24, bk. XI, ch. 6, at 156 (With these restraints, "the judiciary is in some measure next to nothing: there remain, therefore, only two [*i.e.*, executive and legislative power].").

64 In this distinct and separate existence of the judicial power, in a peculiar body of men, nominated indeed, but not removeable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in

that England's government provided the best model of separation of powers and checks and balances.[65]

2. *Separation of Powers and Popular Sovereignty During the Revolutionary War and Its Aftermath*

The Revolutionary War ushered in a decade of political, social, and intellectual upheaval during which Americans gradually reevaluated—and ultimately transformed—English notions of separation of powers and sovereignty.[66]

Initially, however, Americans reaffirmed British political principles and contended that these precepts had been disregarded in the colonies. For example, the Declaration of Independence condemned England's tyrannical violation of separation of powers.[67] Moreover, in repudiating the claim that the sovereign King-in-Parliament had absolute power over the colonies,[68] the Declaration relied on the Lockean idea that the People had the right to revolt against an unjust government not founded on their consent.[69] Once Americans had success-

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some degree separated both from the legislative and also from the executive power.

1 WILLIAM BLACKSTONE, COMMENTARIES *269; *see also* VILE, *supra* note 21, at 104-05 (describing Blackstone's integration of Montesquieu's idea of a separate judicial power with the English tradition of independent, professional judges).

65 First, the British legislature had aristocratic and democratic chambers that checked each other, and the House of Lords moderated differences between the people and the king, especially through its ultimate judicial authority. Second, Parliament exercised full legislative powers and could hold the executive accountable. Finally, the king wielded considerable executive power and could veto legislation. *See* MONTESQUIEU, *supra* note 24, bk. XI, ch. 6; 1 WILLIAM BLACKSTONE, COMMENTARIES *233-36.

66 The definitive account of this period is WOOD, *supra* note 25; *see also* VILE, *supra* note 21, at 119-75; JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 1-195 (1971) (describing the transplantation of English judicial ideas to American colonial, state, and early national courts).

67 The Declaration assailed the King's tyrannous consolidation of legislative, executive, and judicial functions and accused him of (1) forcing colonial legislatures to comply with his will and, failing that, either dissolving them "for opposing . . . his invasions on the rights of the people" or suspending them and assuming legislative powers; (2) not executing existing laws fairly; (3) "obstruct[ing] the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers . . . . [and making] Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries;" and (4) creating new executive offices to harass Americans. THE DECLARATION OF INDEPENDENCE paras. 7, 11-13. *See generally* VILE, *supra* note 21, at 121-22, 126-32 (detailing Americans' criticism of colonial governments for violating separation of powers).

68 The Declaration deemed the King "unfit to be the ruler of a free people" because he had sought to establish "an absolute Tyranny over these States," and criticized Parliament's "attempts . . . to extend an unwarrantable jurisdiction over us." THE DECLARATION OF INDEPENDENCE paras. 2, 30-31. *See generally* WOOD, *supra* note 25, at 173-81, 259-68, 344-54 (discussing the colonists' rejection of Parliament's claims of unlimited sovereign power); Amar, *Sovereignty*, *supra* note 13, at 1430, 1444-45 (same).

69 *See* THE DECLARATION OF INDEPENDENCE para. 2 ("Governments . . . deriv[e] their just powers from the consent of the governed."); *see also supra* note 25 (discussing Locke); Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94

fully asserted that right, however, they followed British theory by immediately re-vesting sovereignty in the government (specifically, in the legislature).[70]

The new state constitutions (adopted 1776-77) and the Articles of Confederation (drafted 1778) granted nearly all power to legislatures and established only token executive and judicial branches.[71] These government charters had separation of powers in form but not substance. State constitutions generally distinguished the three governmental functions,[72] and many required absolute separation. For example, the Virginia Constitution provided:

> The legislative, executive, and judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time.[73]

COLUM. L. REV. 457, 463 (1994) [hereinafter Amar, *Consent*] (The Declaration's main purpose was to demonstrate Americans' Lockean right to revolt because England had violated their fundamental legal rights.). Wilson had made the earliest version of the argument that culminated in the Declaration: The American People had not consented to be governed by the British Parliament and had no power in it; therefore, Parliament should have no authority over the colonies. *See* Considerations on the Nature and Extent of the Legislative Authority of the British Parliament (1774), *reprinted in* 2 WILSON'S WORKS, *supra* note 10, at 721-46.

70 *See, e.g.*, WOOD, *supra* note 25, at 352-53, 373-74.

71 *See id.* at 132-61, 305 (Americans' bitter experience with royal governors and judges led them to dramatically decrease executive and judicial power and to increase legislative authority.); *see also* VILE, *supra* note 21, at 134-35, 148; William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 478-79 (1989) [hereinafter Gwyn, *Separation*].

72 *See, e.g.*, Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 216 (1989); Malcolm P. Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 417 (1934). For an excellent summary of separation of powers in state constitutions, see WOOD, *supra* note 25, at 150-61.

73 VA. CONST. of 1776 para. 2; *see also* GA. CONST. of 1777 art. I (adopting same language); MASS. CONST. of 1780, pt. I, art. 30 ("[T]he legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them."); MD. CONST. of 1776 art. VI ("[T]he legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other."); N.C. CONST. of 1776 art. IV (same). *See* VILE, *supra* note 21, at 119; Russell K. Osgood, *Early Versions and Practices of Separation of Powers: A Comment*, 30 WM. & MARY L. REV. 279, 280-83 (1989).

Only one constitution acknowledged that absolute separation was impossible, and it was ratified long after the earlier state charters had proved untenable. *See* N.H. CONST., Bill of Rights, art. XXXVII; *see also* THE FEDERALIST No. 47, at 327 (James Madison) (Jacob E. Cooke ed., 1961) (praising New Hampshire's practical approach). (All citations to particular material within a *Federalist Paper* will be from this edition and will include the author's last name only.) *See generally* Casper, *supra* note 72, at 218-19 (discussing New Hampshire constitution); *infra* notes 93, 161-62, 170 and accompanying text (describing the Framers' rejection of pure separation of powers).

With few exceptions, however, state constitutions failed to fortify these "parchment barriers" with meaningful checks.[74] Indeed, state legislatures chose the chief executive and did not allow him to appoint and direct his ministers[75] or to veto bills.[76] The legislatures also controlled the judiciary's appointment, tenure, and salary,[77] and often could require judges to render advice.[78] In short, state constitutions allowed dangerous combinations of legislative, executive, and judicial powers.[79]

So did the Articles of Confederation, which granted the limited powers of the central government almost entirely to a Congress that dominated the executive and judiciary.[80] The Revolution's end in 1783 accelerated the disintegration of the Confederation, and corre-

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74 THE FEDERALIST No. 48, at 333 (Madison); *see also* THE FEDERALIST No. 47, at 331 (Madison) (noting that state constitutions did not provide "for maintaining in practice the separation delineated on paper," reflecting the "haste" and "inexperience" of the drafters). *See* VILE, *supra* note 21, at 133-34, 141.

The Massachusetts Constitution of 1780 and the New York Constitution of 1777 were notable exceptions. *See* THE FEDERALIST No. 47, at 327-29 (Madison). In the former, Adams implemented the sophisticated ideas about separation of powers he had presented in his THOUGHTS ON GOVERNMENT (1776), *reprinted in* 4 THE WORKS OF JOHN ADAMS 195-96, 205-06 (C.F. Adams ed., 1865) [hereinafter ADAMS's WORKS]. *See generally* WOOD, *supra* note 25, at 434, 568 (observing that the Massachusetts Constitution was considered a model); Sharp, *supra* note 72, at 406. The New York Constitution was similarly influential. *See* VILE, *supra* note 21, at 133-34, 148; Casper, *supra* note 72, at 216-17; Sharp, *supra* note 72, at 417-18.

75 *See* VILE, *supra* note 21, at 142-43; WOOD, *supra* note 25, at 138-50. Only New York, Massachusetts, and New Hampshire allowed the direct election of governors. *See* WOOD, *supra* note 25, at 434-35; Casper, *supra* note 72, at 216-17.

76 The only exceptions were Massachusetts and New York, which recognized a veto that the legislature could override. *See* WOOD, *supra* note 25, at 136-37, 141, 434; Casper, *supra* note 72, at 217; *see also* Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 673 (1990) [hereinafter Alfange, *Normalcy*] (discussing state constitutional provisions that created weak executive branches).

77 *See* 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 27-28 (1911) (Madison) (emphasizing state judges' dependence on legislators); THE FEDERALIST No. 81, at 544-45 (Hamilton) (noting that four of thirteen states did not even have separate judiciaries); *see also* WOOD, *supra* note 25, at 159-61, 407-08; Pushaw, *supra* note 36, at 469-70.

78 *See, e.g.*, MASS. CONST. of 1780, pt. II, ch. 3, art. 2 (The legislature and the governor could "require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions."); Pushaw, *supra* note 36, at 481-82 nn.176-77 (summarizing advisory opinion practice).

79 *See, e.g.*, THE FEDERALIST No. 48, at 333 (Madison) (In drafting their state constitutions, Americans feared executive prerogatives so much that they ignored "the danger from legislative usurpations; which by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations."); *see also* VILE, *supra* note 21, at 120, 143; WOOD, *supra* note 25, at 155-56, 403-13; Gwyn, *Separation*, *supra* note 71, at 479.

80 ARTICLES OF CONFEDERATION art. IX (authorizing Congress to appoint temporary executive committees and judicial tribunals). *See* 2 ELLIOT, *supra* note 17, at 459 (Wilson) (The Articles created "a single body . . . possessed of legislative, executive, and judicial powers."); 3 *id.* at 83 (Randolph) (same); THE FEDERALIST No. 38, at 247 (Madison) (same). For discussion of the separation-of-powers problems with the Articles, see WOOD, *supra* note 25, at 549-50; Alfange, *Normalcy*, *supra* note 76, at 674-75; Amar, *Sovereignty*, *supra*

spondingly increased the autonomy—and abusiveness—of the states.[81] In sum, America's early constitutions were defective in theory and proved disastrous in practice, as unrestrained legislatures produced near-anarchy.[82]

The necessity of reconstructing these governments became the mother of invention, as reformers like Wilson,[83] Madison, and Hamilton[84] gradually created a novel political theory. Experience had demonstrated the wisdom of English separation-of-powers doctrine—

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note 13, at 1442-43; Calabresi & Prakash, *supra* note 29, at 600-03; Sharp, *supra* note 72, at 418-19.

81 The Articles created a loose confederation of sovereign states that ignored the national government with impunity. *See, e.g.*, THE FEDERALIST Nos. 15-16, 20-21 (Hamilton) (describing the disastrous consequences of state defiance); 1 FARRAND, *supra* note 77, at 18-19 (Randolph) (lamenting the federal government's total inability to protect national interests, enforce federal law against defiant states, or check often-violent quarrels between states); *see also* WOOD, *supra* note 25, at 354-63, 393-429, 463-67; Amar, *Sovereignty*, *supra* note 13, at 1441, 1446-48.

82 *See, e.g.*, 3 ELLIOT, *supra* note 17, at 399 (Madison). The classic descriptions of the defects of America's state and national governments are found in THE FEDERALIST Nos. 1, 6-9, 11-13, 15-17, 21-22 (Hamilton); Nos. 2-5 (Jay); Nos. 10, 14, 18-20 (Madison); *see also* WOOD, *supra* note 25, at 475-83; Alfange, *Normalcy*, *supra* note 76, at 673; Amar, *Sovereignty*, *supra* note 13, at 1440-41.

83 Wilson was the leading critic of the Pennsylvania Constitution of 1776, which vested nearly all governmental power in a single legislature and produced some of the earliest and worst legislative abuses. *See* 1 WILSON'S WORKS, *supra* note 10, at 20-24 (editor's comments) (describing Wilson's attacks against Pennsylvania's government); *see also* THE FEDERALIST No. 48, at 336-38 (Madison) (The Pennsylvania legislature usurped executive and judicial power.).

Accordingly, Wilson was the first to articulate the ideas that became the foundation of Federalist thought—namely, that the People should delegate some of their sovereign power to a government consisting of a two-house legislature, an elected executive, and an independent judiciary. *See* WOOD, *supra* note 25, at 438-53; *see also* 1 WILSON'S WORKS, *supra* note 10, at 24-25 (editor's comments) (In the 1780s, Wilson developed the argnment that popular sovereignty could justify strengthening the national government without threatening liberty.). Wilson also joined the effort to amend the Articles of Confederation. *See* 1 *id.* at 21 (editor's comments).

84 Immediately after the war ended, Madison and Hamilton recommended procedures for paying the war debt and preserving the Confederation's harmony. *See* ADDRESS TO THE STATES, BY THE UNITED STATES IN CONGRESS ASSEMBLED (Apr. 26, 1783), *reprinted in* 1 ELLIOT, *supra* note 17, at 96-100; *see also* MR. MADISON'S RESOLUTION FOR EMPOWERING CONGRESS TO REGULATE TRADE (Nov. 30, 1785), *reprinted in* 1 ELLIOT, *supra* note 17, at 114-15. At the Annapolis Convention, Hamilton and Madison lamented the deficiencies of the Articles in administering domestic and foreign affairs and recommended that Congress be given greater power to regulate trade and commerce. *See* PROCEEDINGS OF THE COMMISSION TO REMEDY THE DEFECTS OF THE FEDERAL GOVERNMENT (Sept. 11, 1786), *reprinted in* 1 ELLIOT, *supra* note 17, at 116-18.

While Madison spearheaded national reform efforts, Jefferson played the leading role within Virginia. Indeed, Madison's definitive treatment of separation of powers explicitly built upon Jefferson's trenchant observation that Virginia's legislature combined

> "[a]ll the powers of government, legislative, executive, and judiciary. . . . The concentrating [of] these in the same hands is precisely the definition of despotic government . . . . An *elective despotism*, was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced

especially its insistence on a strong executive[85] and independent courts.[86] But the British model of separation, which balanced three competing social orders, could not be duplicated in America, which lacked a hereditary aristocracy and monarchy.[87]

Federalists responded by developing a fresh approach, based on the insight that "the People" collectively (not as members of social classes) were the source of the governmental power that had to be separated.[88] The relocation of sovereignty from legislatures to the People (not just in moments of revolution, but permanently)[89] made all government departments—including the executive and judiciary—the People's agents and representatives.[90] Acting through conventions, the People could define and limit all governmental power in written constitutions—a fundamental, supreme law. The reconceptualization of separation of powers especially benefitted the judiciary, which came to be seen as the People's representative in upholding their constitutions against contrary legislative and executive acts.[91]

> . . . that no one could transcend their legal limits, without being effectually checked and restrained by the others."

See THE FEDERALIST No. 48, at 335 (Madison), *quoting* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1786); *see also* VILE, *supra* note 21, at 149 (concluding that Madison, Jefferson, and Wilson primarily developed the new American constitutional theory).

85 *See supra* notes 29-32, 40 and accompanying text. Adams and Jefferson, who at the time of the Revolution had believed that the legislature should appoint the executive, now argued that separation of powers required his popular election. *See* Sharp, *supra* note 72, at 399 (citing sources).

86 *See supra* note 34. Legislative domination of judiciaries after the Revolution led to a renewed appreciation of the need for independent courts. *See, e.g.*, WOOD, *supra* note 25, at 454.

87 *See* VILE, *supra* note 21, at 120, 126, 141, 151; WILLS, *supra* note 42, at 104-07; WOOD, *supra* note 25, at 554-56.

88 The British Constitution, based on "different orders" in society, could not be applied to America, where "all authority is derived from the people." 2 ELLIOT, *supra* note 17, at 434 (Wilson); *see also* 2 *id.* at 423-24 (Wilson) (The English government was not based on popular representation because (1) the executive was not elected, and the Crown appointed judges; and (2) the legislature included the House of Lords and the King, neither of whom represented the people.); 1 WILSON'S WORKS, *supra* note 10, at 310-11 (England did not treat executive and judicial officers as representatives of the People.). For further discussion, see WILLS, *supra* note 42, at 104-07; Casper, *supra* note 72, at 216.

89 *See* WOOD, *supra* note 25, at 362-63, 372-83; Amar, *Sovereignty*, *supra* note 13, at 1430-37, 1444-45. The Declaration of Independence embodied the Lockean principle that sovereignty was derived from the People and could be reclaimed by them only in violent revolutions, *see supra* notes 67-70 and accompanying text, whereas the Constitution reflected the new American idea that sovereignty always remained vested in the People. This sovereignty could be exercised peacefully by majority vote in special conventions called to ratify, alter, or abolish constitutions. *See* Amar, *Consent*, *supra* note 69, at 464, 470-94, 500.

90 *See, e.g.*, MASS. CONST. of 1780 art. V ("All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them."). *See* VILE, *supra* note 21, at 137, 145; WOOD, *supra* note 25, at 383-89.

91 *See* VILE, *supra* note 21, at 157; WOOD, *supra* note 25, at 259-63, 273-82, 291-343, 389, 453-63; *see also* GOEBEL, *supra* note 66, at 50-95 (describing the emerging judicial control

These new ideas about separation of powers and sovereignty interacted synergistically in the mid-1780s and crystallized during the framing and ratification of the Constitution.[92]

B. Separation of Powers in the Constitution

Just as a skeleton cannot be observed but shapes a body, the phrase "separation of powers" cannot be found in the Constitution[93] yet structures the document. Indeed, it was "the sacred maxim" of government.[94] Therefore, the Framers' understanding of separation

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over legislatures); David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 282-83 n.7 (1992) (summarizing state court exercises of judicial review in the 1780s).

Two decisions are of particular significance. First, in Commonwealth v. Caton, 8 Va. (4 Call) 5 (1782), Virginia's highest court invalidated a pardon because it was not granted in accordance with the state constitution. The court included John Blair, who became one of the original Supreme Court Justices. *See infra* note 191. Second, in Bayard v. Singleton, 1 N.C. (1 Mart.) 42 (1787), James Iredell persuaded the North Carolina Supreme Court to invalidate a statute because it conflicted with the state constitution, a fundamental and superior law. *See* WOOD, *supra* note 25, at 460-62; *see also supra* note 16 (describing Iredell's understanding of judicial review as early as 1783); *infra* part I.C (analyzing Iredell's application of this theory as one of the first Supreme Court Justices).

92 Americans grasped these new concepts at different times. Wilson began to articulate such theories shortly after the Revolutionary War began. *See supra* note 83. During the mid-1780s, Madison and others embraced and refined this concept of separation of powers, which became "the dominant principle of the American political system." *See* WOOD, *supra* note 25, at 449.

On the other hand, many Americans rejected the new wisdom. Indeed, even Adams, the foremost constitutional theorist of the Revolutionary War era, misunderstood the Federalist Constitution's fusion of popular sovereignty and separation of powers. In 1787, Adams published a three-volume treatise in which he defended traditional separation theories. *See* A DEFENCE OF THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA (1787), *reprinted in* 4 ADAMS'S WORKS, *supra* note 74, at 284, 308-09, 382, 398, 405, 429; 5 *id.* at 452-54; 6 *id.* at 114, 116-18, 127, 145-46; *see also* Sharp, *supra* note 72, at 398-406 (summarizing Adams's work and influence). Adams, however, clung to the classical mixed-government view that each department represented a different social interest, rather than the People. *See* VILE, *supra* note 21, at 148-49; WOOD, *supra* note 25, at 567-92.

93 Madison proposed amending the Constitution to include the following requirement:

> The powers delegated by this constitution, are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial; nor the executive exercise the powers vested in the legislative or judicial; nor the judicial exercise the powers vested in the legislative or executive departments.

12 THE PAPERS OF JAMES MADISON 202 (C. Hobson & R. Rutland eds., 1979) [hereinafter MADISON PAPERS]. Madison argued that this amendment would make explicit that "the powers ought to be separate and distinct" and would provide a rule for "the construction of the Constitution." 1 ANNALS OF CONG. 760 (J. Gales ed., 1789). The House adopted Madison's amendment, 1 *id.* at 760-61, but the Senate rejected it. *See* 1 THE BILL OF RIGHTS 1150 (Bernard Schwartz ed., 1971). For analysis of why the Constitution does not contain an express separation-of-powers provision, see *infra* notes 161-62, 170 and accompanying text.

94 *See* THE FEDERALIST No. 47, at 331 (Madison); *see also id.* at 323 (expressing the "political maxim" that "the legislative, executive and judiciary departments ought to be

of powers and the related concept of checks and balances must be carefully examined.

1. *Separation of Powers, Popular Sovereignty, and Limited National Government*

The Constitution incorporated a theory of separation of powers[95] transformed by popular sovereignty.[96] "We the People of the United States" established the Constitution[97] for three principal reasons, all related to separation of powers. The first was "to secure the Blessings of Liberty," an overriding goal of separation.[98] The second was "to establish Justice"—the purpose of the rule of law, which had emerged as perhaps the most important justification for the doctrine.[99] The

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separate and distinct"); THE FEDERALIST No. 81, at 543 (Hamilton) (emphasizing the "celebrated maxim requiring a separation of the departments of power").

95 Every plan for government submitted at the Convention rested on separation of powers. *See* 1 FARRAND, *supra* note 77, at 21-22 (Randolph Plan); 1 *id.* at 243-44 (Paterson Plan); 3 *id.* at 108 (Pinckney's explanation of his plan). The Convention's first substantive resolution, accepted without debate, was "that a national government ought to be established consisting of a supreme legislative, judiciary, and executive." 1 *id.* at 30; *see also* 1 *id.* at 335. No one at the Convention or Ratification debates questioned that the Constitution had to be based on this principle.

96 *See* ACKERMAN, *supra* note 13, at 216-18; WOOD, *supra* note 25, at 530-53, 596-609.

The Constitution balanced government power flowing from a People undifferentiated by class—unlike England's sovereign "King-in-Parliament," which balanced various social interests. *See supra* note 47. Nonetheless, the Constitution retained vestiges of mixed-government theory by providing for the one (the President), the few (the Senate), and the many (the House of Representatives). *See* GWYN, MEANING, *supra* note 21, at 117. None of those institutions, however, spoke for a particular social class. *See* 1 WILSON'S WORKS, *supra* note 10, at 314-15 ("In the government of the United States, separate orders of men do not exist . . . ."). Rather, the Constitution depended on the "republican genius" of the American People. *See* THE FEDERALIST Nos. 39, 55 (Madison); THE FEDERALIST Nos. 36, 60 (Hamilton); *see also* VILE, *supra* note 21, at 134; WILLS, *supra* note 42, at 104-07, 179-84.

97 The Preamble announced the Constitution's "leading principle": that the very existence of the government "depends upon the supreme authority of the people alone." 2 ELLIOT, *supra* note 17, at 443 (Wilson); *see also* 2 *id.* at 434-35, 497-99 (Wilson); THE FEDERALIST No. 84, at 578-79 (Hamilton).

98 *See supra* note 41 and accompanying text; *see also* THE FEDERALIST No. 51, at 348 (Madison) ("[The] separate and distinct exercise of the different powers of government . . . is admitted on all hands to be essential to the preservation of liberty . . . ."); 4 ELLIOT, *supra* note 17, at 73-74 (Iredell).

99 *See supra* notes 42-45 and accompanying text. The Constitution guaranteed the impartial administration of justice by separating Congress's power over general legislation from the specific execution and application of the law by an independent executive and judiciary. This rule-of-law rationale undergirds Madison's famous declaration that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47, at 324; *see also id.* at 325-26 ("[W]here the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted."); WILLS, *supra* note 42, at 112-15 (stressing the importance of the rule of law in Publius's view of separation of powers). Other Founders shared this commitment to "a government of laws and not men." *See, e.g.*, 1 WILSON'S WORKS, *supra* note 10, at 290.

third was to resolve the nation's domestic and foreign problems by instituting an efficient government—another major rationale for separation.[100]

The People delegated far more power to their national government so it could achieve its objectives effectively.[101] They prevented that government (specifically, its legislature) from becoming tyrannical[102] by dividing Congress into two houses[103] and by creating strong

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100 U.S. CONST. pmbl. (The Constitution aimed "to form a more perfect Union, . . . insure domestic tranquility, provide for the common defence, [and] promote the general Welfare."). *See* THE FEDERALIST Nos. 2-5 (Jay) (describing foreign dangers facing disunited America); THE FEDERALIST Nos. 6-9 (Hamilton) (predicting that interstate conflicts would escalate without a strong union); *see also supra* note 40 and accompanying text (setting forth the efficiency justification).

101 *See, e.g.*, 1 ELLIOT, *supra* note 17, at 498 (Jay) (The Constitution defines that portion of the national business that the People thought proper to assign to the federal government.). Correspondingly, the People granted less of their sovereign power to their state governments.

Wilson made the argument linking popular sovereignty to both federalism and separation of powers "[m]ore boldly and more fully than anyone else." WOOD, *supra* note 25, at 530. According to Wilson, "the supreme power . . . resides in the people, as the fountain of government." *See* 2 ELLIOT, *supra* note 17, at 456; *see also* 2 *id.* at 432-34, 443, 455, 457-58, 461, 478, 524; 2 FARRAND, *supra* note 77, at 52, 69; 1 WILSON'S WORKS, *supra* note 10, at 77, 79, 303-04, 414; 2 *id.* at 497. The People exercised this power by delegating portions of their authority to their representatives. *See* 2 ELLIOT, *supra* note 17, at 423, 478; 1 WILSON'S WORKS, *supra* note 10, at 317, 402-06. America diffused this "vital principle" of popular representation throughout its governments. *See* 2 ELLIOT, *supra* note 17, at 424-25; 1 WILSON'S WORKS, *supra* note 10, at 311-12. The People could "distribute one portion of power to the . . . *state governments*" and "another proportion to the government of the United States" in "what manner they please." 2 ELLIOT, *supra* note 17, at 444, 456-57; *see also* 1 WILSON'S WORKS, *supra* note 10, at 73, 401-02. Thus, "[t]he power both of the general government, and the state governments . . . [are] emanations of power from the people." 2 ELLIOT, *supra* note 17, at 502.

Other leading Federalists echoed Wilson's argument that the People could allocate power between the federal and state governments, then subdivide this power among three branches in each government, thereby establishing "a double security for the people." 2 ELLIOT, *supra* note 17, at 257 (Hamilton); *see also* THE FEDERALIST No. 46, at 315 (Madison); THE FEDERALIST No. 51, at 323 (Madison); Amar, *Sovereignty*, *supra* note 13, at 1443-44, 1449-51, 1493-94.

102 "In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself." THE FEDERALIST No. 51, at 349 (Madison). The branch least restrained and most likely to become tyrannical was the legislature, because "[i]n republican government the legislative authority, necessarily, predominates." *Id.* at 350; *see also* THE FEDERALIST No. 49, at 341-42 (Madison); THE FEDERALIST No. 71, at 483-84 (Hamilton). Thus, "it is against the enterprising ambition of [the legislature], that the people ought to indulge all their jealousy and exhaust all their precautions." THE FEDERALIST No. 48, at 334 (Madison). *See generally* RAOUL BERGER, CONGRESS V. THE SUPREME COURT 8-16, 82, 126-27, 132 (1969) (describing the Framers' fear of despotic legislators).

103 Congress was split into a large lower house and a more selective upper chamber—the familiar English device of bicameralism, except that both the House and Senate represented the People. *See* 1 WILSON'S WORKS, *supra* note 10, at 414.

Bicameralism was essential to diffuse legislative power. *See* THE FEDERALIST No. 51, at 349-50 (Madison); THE FEDERALIST No. 62, at 418 (Madison); THE FEDERALIST No. 63, at 425 (Madison); *see also* 2 ELLIOT, *supra* note 17, at 445, 447, 454-55, 480 (Wilson) (charac-

executive and judicial branches.[104] Jay summarized this balanced approach:

> The Convention . . . [formed] a government . . . sufficiently energetic to raise us from our prostrate and distressed situation . . . [yet] perfectly consistent with the liberties of the people . . . . [The Framers] not only determined that [the government] should be erected by, and depend on the people; but remembering the many instances in which governments vested solely in one man, or one body of men, had degenerated into tyrannies, they judged it most prudent that the three great branches of power should be committed to different hands.[105]

a. *Separating Power In Coordinate, Independent Branches*

With trinitarian symmetry, the Constitution's first three Articles establish three distinct departments and grant each primary responsibility for exercising one of the three major types of governmental power.[106] Article I vests in Congress "legislative powers"—authority to

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terizing the legislative branches as "mutual checks"); 1 WILSON'S WORKS, *supra* note 10, at 414-16, 431 (Legislative power was divided to avoid congressional extremism and tyranny and to promote thoughtful lawmaking.). *See generally* WOOD, *supra* note 25, at 559 (arguing that Federalists treated bicameralism as another way of achieving the separation-of-powers goal of dispersing legislative power).

104 *See* 2 ELLIOT, *supra* note 17, at 445-48 (Wilson) (To prevent "dreadful" legislative despotism, the Constitution cleaves the legislature and establishes a powerful, independent President and judiciary.); 2 FARRAND, *supra* note 77, at 79 (Wilson) ("[T]he joint weight of the[se] two departments was necessary to balance the single weight of the Legislature."); THE FEDERALIST No. 48, at 333 (Madison) (The Constitution properly gave the executive and judiciary adequate defenses against the legislature, which "is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."); 1 FARRAND, *supra* note 77, at 108 (Madison); Amar, *Sovereignty*, *supra* note 13, at 1442-43; Sharp, *supra* note 72, at 393, 396, 408, 435.

105 1 ELLIOT, *supra* note 17, at 496-97; *see also* 2 *id.* at 438 (Wilson) (To prevent tyranny, the People "properly distributed" the powers of government among its "three constituent parts."); 2 *id.* at 350 (Hamilton) ("The true principle of government is this—make the system complete in its structure, give a perfect proportion and balance to its parts, and the powers you give it will never affect your security."); 2 *id.* at 348 (Hamilton).

106 U.S. CONST. art. I, § 1; art. II, § 2; art. III, § 1; *see also* Calabresi & Prakash, *supra* note 29, at 559-70 (The Constitution's first three Articles begin with similarly worded clauses that vest only three kinds of powers—legislative, executive, and judicial—in three institutions.); *id.* at 606, 609-10 (describing the Framers' attachment to the idea that all government was divided into three parts).

Wilson held a particularly rigid and symmetrical view of separation. *See, e.g.*, 2 ELLIOT, *supra* note 17, at 479 ("[T]he legislative, executive and judicial powers are kept nearly independent and distinct . . . . [I]n no constitution . . . is this great principle so strictly adhered to or marked with so much precision and accuracy as in this."); 2 *id.* at 438, 458-59, 461, 504-07, 510-14 (urging strict separation); 1 WILSON'S WORKS, *supra* note 10, at 290-300, 402 (same). *See generally* Sharp, *supra* note 72, at 411-14 (explaining Wilson's theory).

Madison took a more flexible approach. On the one hand, he embraced the "fundamental principle of free Govt. that the Legislative, Executive, & Judiciary powers should be *separately* exercised." 2 FARRAND, *supra* note 77, at 56. He also recognized that the Constitution "discriminat[es], the several classes of power, as they may in their nature be legisla-

make general, prospective rules reflecting the electorate's policy preferences[107]—in eighteen areas.[108] Article II vests in the President "the executive Power" to administer the laws,[109] imposes the duty to do so

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tive, executive, or judiciary," and protects from interference "the powers properly belonging to one of the departments." *See* THE FEDERALIST No. 48, at 332; *see also* 6 MADISON PAPERS, *supra* note 93, at 144. Madison elsewhere reaffirmed that certain powers inherently fell into one of those three categories. *See, e.g.*, 1 FARRAND, *supra* note 77, at 67. On the other hand, Madison argued that maintaining separation in practice required functional blending and other checks, thereby rendering impractical the formulation of exact, all-inclusive definitions of legislative, executive, and judicial power. *See* Jack N. Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473, 489-96 (1988) (evaluating Madison's complex separation theory); *infra* part I.B.2 (discussing checks and balances).

It does not logically follow, however, that Madison or his colleagues thought that the Constitution's references to those powers were hopelessly indeterminate, as some have argued. *See, e.g.*, Alfange, *Normalcy*, *supra* note 76, at 711-12; Gwyn, *Indeterminacy*, *supra* note 26, at 265-68. If that were so, the Constitution would simply have declared: "Congress can do X, the President can do Y, and the courts can do Z." Instead, the Framers chose to begin Articles I, II, and III with the parallel phrases "legislative power," "executive power," and "judicial power," presumably intending to convey some meaning thereby. And there was a common understanding of the basic nature of such powers, which derived its content from Anglo-American legal experience, as modified by specific constitutional language. *See, e.g.*, Calabresi & Prakash, *supra* note 29, at 561 n.69; *see also* Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were To Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 455, 465 (1991) (Articles I, II, and III convey to each branch a particular type of power and thereby prohibit any department from exercising power not granted, with specific and limited exceptions.); *id.* at 453-55, 475-90, 505-06 (proposing a separation-of-powers approach that formally defines each branch's authority but pragmatically allows those definitions to evolve).

In short, the Framers believed that all governmental powers could be classified as either legislative, executive, or judicial and therefore could be divided functionally among the three departments, even though they disagreed about the proper category in which to place certain governmental activities. *See* Ann Stuart Anderson, *A 1787 Perspective on Separation of Powers*, *in* SEPARATION OF POWERS—DOES IT STILL WORK? 141, 145 (Robert A. Goldwin & Art Kaufman eds., 1986).

107 *See supra* note 27 and accompanying text; *see also* THE FEDERALIST No. 75, at 504 (Hamilton) ("The essence of the legislative authority is to enact laws."); THE FEDERALIST No. 33, at 204 (Hamilton) ("What is a LEGISLATIVE power but a power of making LAWS?"); THE FEDERALIST No. 78, at 523 (Hamilton) (Congress "prescribes the rules by which the duties and rights of every citizen are to be regulated."); Redish & Cisar, *supra* note 106, at 479 (defining "legislative power" as the promulgation of general standards of conduct to achieve certain policy ends).

108 U.S. CONST. art. 1, § 8. The core legislative powers of taxing and spending are included. *See id.* Of special importance is Congress's power to define federal court jurisdiction. *See* U.S. CONST. art. I, § 8, cl. 9; U.S. CONST. art. III, §§ 1-2; *see also infra* note 179 (discussing this power).

109 U.S. CONST. art. II, § 1. *See* THE FEDERALIST No. 72, at 486 (Hamilton) (The Constitution entrusts the President with "[t]he administration of government."); THE FEDERALIST No. 75, at 504 (Hamilton) (The executive function centers on "execution of the laws."); 6 MADISON PAPERS, *supra* note 93, at 141, 145-46 ("Executive" power presupposes an existing law to be carried out.). *See generally* Calabresi & Prakash, *supra* note 29, at 579-80 (In Anglo-American law, the minimalist definition of "executive power" is authority to administer laws.); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 15-16 (1993) [hereinafter Monaghan, *Protective*] (demonstrating that the Framers shared an understanding that "executive power" limited the President to executing, rather than making, laws).

"faithfully,"[110] and confers eleven other traditional executive functions.[111] Finally, Article III vests in federal courts "the judicial Power"[112]—the authority to expound pre-existing legal rules in a

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110 The President must "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. Calabresi and Prakash have argued that Article II's initial Vesting Clause, U.S. CONST. art. II, § 1, cl. 1, grants the President the executive "power," whereas the Take Care Clause creates a "duty." Calabresi & Prakash, *supra* note 29, at 583. The Take Care Clause was intended to prevent the President from claiming that the "executive power" includes the ability to suspend or violate a duly enacted and constitutional statute. *See id.* at 620-21; Peter M. Shane, *The Separation of Powers and the Rule of Law: The Virtues of "Seeing the Trees,"* 30 WM. & MARY L. REV. 375, 380 (1989). Wilson persuasively interpreted the Vesting and Take Care Clauses as giving the President "authority, not to make, or alter, or dispense with the laws, but to execute . . . the laws, which [are] established." 1 WILSON'S WORKS, *supra* note 10, at 440.

The foregoing evidence refutes Justice Scalia's argument that modern standing doctrine serves separation of powers by giving the President absolute discretion over whether or not to enforce a statute. *See infra* notes 441-42 and accompanying text.

111 Although some of the President's powers are exclusive (*e.g.*, granting pardons), most are shared with Congress (*e.g.*, appointing executive officers and directing military and foreign affairs). *See infra* notes 168-70.

Some scholars have argued that the Vesting Clause merely designates the office of the President and that the content of "executive power" is completely defined in its later provisions (*e.g.*, to make treaties, be Commander-in-Chief, etc.). *See, e.g.*, A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 Nw. U. L. REV. 1346, 1363-66 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 47-48 (1994). Others view the Vesting Clause as a broad grant of "executive power" to the President that is subsequently qualified by the listed powers, but contend that the President retains certain unenumerated, residuary powers (for example, to remove all executive officers at will) as part of the general "executive power" to control the administration of federal law. *See* Calabresi & Prakash, *supra* note 29, at 570-78; *see also* Monaghan, *Protective*, *supra* note 109, at 9-11, 20-31, 39, 48-51 (contending that the President has limited residual powers to protect U.S. personnel and property, to exercise discretion as to the means of implementing legislation, and to make foreign policy, but cannot violate the law, invade private rights absent statutory authorization, or act inconsistently with specific constitutional grants of power to other branches).

Although the Framers understood that workable government requires some exercise of discretion, they felt that the scope of such discretionary powers bad to be narrow. Broad assertions of "inherent" executive authority conflict with the idea of a limited Constitution that separates and expressly specifies the powers of government departments. *See* Redish & Cisar, *supra* note 106, at 483-85.

112 U.S. CONST. art. III, § 1, cl. 1. Calabresi and Prakash support their argument for vast executive power by emphasizing that the Vesting Clauses of Articles II and III contain broad grants of "the executive power" and "the judicial power," whereas Article I vests in Congress not "the legislative power" generally, but only "legislative Powers *herein granted*." Calabresi & Prakash, *supra* note 29, at 563, 570-71, 577-78 (emphasis added). Convention records, however, indicate that this linguistic variation has no substantive importance. *See* Monaghan, *Protective*, *supra* note 109, at 22. Professor Pfander has suggested to me that this wording might reflect the coextensiveness principle: A "herein granted" limit on legislative power would necessarily restrict executive and judicial power to those same grants, for the latter two powers could operate only on prior legislative acts. *See infra* notes 115-16 and accompanying text.

particular fact situation[113]—in nine types of "Cases" and "Controversies."[114]

The Founders accepted the inherent primacy of legislative power: Without congressional action, the President would have no law to execute, and the courts no law to expound.[115] The exercise of legislative power, however, was a two-edged sword. If Congress did pass a statute, it could be executed only by the President and interpreted authoritatively only by the courts. Indeed, a Federalist axiom, rooted in the rule of law, was that "the executive and judicial departments ought to have power commensurate to the extent of the laws."[116]

Effective separation demanded that each branch exercise its core function independently,[117] which the Constitution ensured through

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113 *See supra* notes 35-36 and accompanying text. *See, e.g.*, 1 WILSON'S WORKS, *supra* note 10, at 296 ("The judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases . . . ."); Anderson, *supra* note 106, at 146 (The Convention delegates "agree[d] that judicial power meant expounding the laws, explaining or interpreting them."); Pushaw, *supra* note 36, at 490-91 (detailing Federalists' consensus that judicial power consisted of expounding laws). The Framers tried to limit the 18th-century practice of having judges perform multiple nonjudicial functions. *See, e.g.*, Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 158.

114 These nine Heads of Jurisdiction arguably constitute an affirmative grant of power to federal courts to act. *See* Froomkin, *supra* note 111, at 1352-57. *But see* Calabresi & Prakash, *supra* note 29, at 571 (Article III's initial Vesting Clause is the sole constitutional grant of authority to federal courts.).

115 *See, e.g.*, WILLS, *supra* note 42, at 121, 129; Amar, *Sovereignty*, *supra* note 13, at 1443 n.71; *see also supra* note 28 (In English theory, legislative supremacy meant that its function had to be exercised first, not that such power was unlimited.). Legislative power was not merely first in time but also greatest in scope. *See* THE FEDERALIST No. 51, at 350 (Madison); THE FEDERALIST No. 48, at 334 (Madison). Indeed, the Constitution could not enumerate all legislative powers. *See* THE FEDERALIST No. 44, at 303-05 (Madison). By contrast, executive and judicial powers could be more easily cabined because they were applications of prior legislative acts. *See* THE FEDERALIST No. 48, at 334 (Madison).

116 2 ELLIOT, *supra* note 17, at 464 (Wilson). For similar statements by Wilson, see 2 *id.* at 461 ("For what purpose give the power to make laws, unless they are to be executed? and if they are to be executed, the executive and judicial powers will be engaged in the business."); 2 *id.* at 445 ("The judicial powers are coextensive with the objects of the national government . . . . "); 1 FARRAND, *supra* note 77, at 147 ("[T]he Judicial, Legislative, and Executive departments ought to be commensurate."); *see also* 1 *id.* at 124 (Madison) ("An effective Judiciary establishment commensurate to the legislative authority, was essential. A Government without a proper Executive and Judiciary would be the mere trunk of a body without arms or legs to act or move."); 3 ELLIOT, *supra* note 17, at 532 (same); THE FEDERALIST No. 80, at 535 (Hamilton) (emphasizing "political axiom" that "the judicial power of a government [must be] co-extensive with its legislative" to ensure uniformity in the interpretation of laws). *See* Amar, *Neo-Federalist*, *supra* note 13, at 250-52.

In short, although the three branches might not have been equal in power, they were coordinate in function and equally independent. *See* Anderson, *supra* note 106, at 151-52. The current justiciability doctrines have subverted this coextensiveness principle by abdicating judicial review of legislative and executive action. *See infra* part II.

117 *See, e.g.*, 2 FARRAND, *supra* note 77, at 34 (Madison) ("If it be essential to the preservation of liberty that the Legisl: Execut: & Judiciary powers be separate, it is essential to a maintenance of the separation, that they should be independent of each other."); THE FEDERALIST No. 71, at 483 (Hamilton).

several provisions. First, each department was selected by a different method.[118] Second, terms were fixed—two years for Representatives,[119] six for Senators,[120] four for the President,[121] and permanent tenure for federal judges.[122] Third, all federal officers enjoyed guaranteed compensation.[123] These and other mechanisms were designed primarily to shield the executive and judiciary from congressional influence.[124]

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118 [T]o lay a due foundation for that separate and distinct exercise of the different powers of government, . . . each department should have a will of its own; and consequently should be so constituted, that the members of each should have as little agency as possible in the appointment of the members of the others.

THE FEDERALIST No. 51, at 348 (Madison). Even though the People were the source of all power, each part of the government featured a different mode of selection: the House of Representatives by vote of the People according to population, U.S. CONST. art. I, § 2, cl. 3; the Senate by state legislatures, U.S. CONST. art. I, § 3, cls. 1-2 and § 4, cl. 1; the President by vote of the People through electors, U.S. CONST. art. II, §§ 1-3; and the judiciary through joint presidential-senatorial appointment, U.S. CONST. art. III, § 1. *See* 2 ELLIOT, *supra* note 17, at 438-39 (Wilson).

119 U.S. CONST. art. I, § 2, cl. 1.

120 U.S. CONST. art. I, § 3, cl. 1.

121 U.S. CONST. art. II, § 1; *see also* THE FEDERALIST No. 71, at 484-86 (Hamilton) (arguing that a four-year term is long enough to ensure that the President will firmly exercise his constitutional powers, but short enough to avoid threatening liberty).

122 U.S. CONST. art. III, § 1 (assuring judicial tenure during "good Behaviour"). Life tenure was an "excellent barrier to the encroachments and oppressions of the representative body [a]nd . . . the best expedient . . . to secure a steady, upright and impartial administration of the laws." THE FEDERALIST No. 78, at 522 (Hamilton); *see also id.* at 524 (Permanent tenure is "the citadel of the public justice and the public security.").

123 U.S. CONST. art. I, § 6, cl. 1 (providing for compensation of Representatives and Senators); U.S. CONST. art. II, § 1, cl. 7 (The President's salary shall "neither be encreased nor diminished."); U.S. CONST. art. III, § 1, cl. 1 (ensuring that judges' salaries could not be reduced).

Federalists repeatedly linked the independence of the President and judges to their fixed compensation. *See, e.g.*, THE FEDERALIST No. 51, at 348-49 (Madison) ("[T]he members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal."). For similar sentiments, see 2 ELLIOT, *supra* note 17, at 446 (Wilson); THE FEDERALIST No. 79, at 531 (Hamilton). *See generally* Pushaw, *supra* note 36, at 485 n.194 (describing consistent support at the Convention for safeguarding judicial independence through tenure and salary guarantees); *id.* at 492-93 nn.227-28, 497 n.247 (citing other sources on judicial independence).

124 For example, members of the executive and judiciary were prohibited from simultaneously holding seats in Congress. U.S. CONST. art. I, § 6, cl. 2; *see also* Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045 (1994) (examining the history and purpose of the "Incompatibility Clause" prohibition against multiple officeholding). Similarly, members of Congress cannot be appointed to executive or judicial offices that are created (or given salary increases) during their legislative tenure. U.S. CONST. art. I, § 6, cl. 2; *see also* 1 WILSON'S WORKS, *supra* note 10, at 322 (praising this "Ineligibility Clause"). *See generally infra* notes 463-64 and accompanying text (criticizing the modern Court's denial of standing to citizens who claim that the government has violated the Incompatibility and Ineligibility Clauses).

b. *The Executive and Judiciary as the People's Representatives*

Federalists boldly claimed that all three departments of government represented the People,[125] albeit through the exercise of different functions.[126] In the words of Wilson, the earliest and most forceful proponent of this representational principle: "The executive and judicial powers are now drawn from the same source . . . [as] the legislative authority: they who execute, and they who administer the laws, are as much the servants, and therefore as much the friends of the people, as they who make them."[127] This theme was echoed by

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The Framers expressed little concern that the executive or judiciary might threaten the independence of the legislature. Nonetheless, the Constitution does protect Congress's independence in various ways. *See, e.g.*, U.S. CONST. art. I, § 5 (Each House determines its membership and procedures.); U.S. CONST. art. I, § 6, cl. 1 (granting members of Congress "privilege[ ] from Arrest" during legislative session and immunity from "question[ing] in any other Place" about "any Speech or Debate").

125 *See supra* notes 88-92, 96-97, 101, 105 and accompanying text; *see also* WOOD, *supra* note 25, at 549 ("[B]ecause the Federalists considered 'every branch of the constitution and government to be popular' and regarded the president, Senate, and even the judiciary as well as the House of Representatives as somehow all equal agents of the people's will, they could more easily than their opponents justify the separation and protection of each branch 'by the strongest provisions . . . .'") (citations omitted); Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1085-86 (1988) ("All three branches of government derive, with various degrees of directness, from the People; all three are agencies of the People. No branch, or combination of branches, can uniquely claim to speak for the People themselves; no branch is uniquely representative. Each represents the People in a different and ultimately problematic way."). For similar statements, see ACKERMAN, *supra* note 13, at 181-83, 186; Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 376-77, 385-86 (1976).

126 "*[T]he whole people* of the United States are to be *trebly* represented in [the Constitution] in *three different modes* of representation. . . ." Letters of Fabius (John Dickinson) (1788), *reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 178 (Paul L. Ford ed., 1888).

127 *See* 1 WILSON'S WORKS, *supra* note 10, at 293; *see also* 1 *id.* at 73 ("[E]very citizen elects the legislative, and he takes a personal share in the executive and judicial departments . . . ."); 1 *id.* at 317 ("[T]he powers of magistrates, call them by whatever name you please, are the grants of the people."); 2 ELLIOT, *supra* note 17, at 478-79, 482 (The People exercise supreme power through representation in the legislative, executive, and judicial departments.). *See generally* 1 WILSON'S WORKS, *supra* note 10, at 39 (editor's comment) (Wilson argued that "all branches of government represent the people: the pronouncements of the judiciary, no less than the enactments of the legislature, speak with [their] sovereign authority."); WOOD, *supra* note 25, at 530, 596-603 (discussing Wilsonian representation doctrine).

Madison,[128] Jay,[129] Hamilton,[130] and Iredell.[131] Indeed, the Federalists' original contribution to separation-of-powers theory was the alteration of executive and judicial power through popular sovereignty.[132]

First, while Locke and Montesquieu had insisted that the executive must be a hereditary monarch, and early American governments had required his legislative appointment,[133] the Constitution provided for election of the President.[134] Thus, the President would be the "representative of the people" and account directly to them.[135]

Second, Federalists introduced the radical notion that federal judges derived their power from the People,[136] even though they were not elected to ensure their quality.[137] The Constitution established

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128 *See, e.g.*, THE FEDERALIST No. 49, at 339 ("[T]he people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived . . . ."); THE FEDERALIST No. 39, at 251-52 (The Constitution is truly republican because all government officials, including judges, "derive[ ] all [their] powers directly or indirectly from . . . the people.").

129 [T]he judgments of our courts, and the commissions constitutionally given by our [executive], are as valid and as binding on all persons whom they concern, as the laws passed by our legislature are. All constitutional acts of power, whether in the executive or in the judicial departments, have as much legal validity and obligation as if they proceeded from the legislature . . . . [T]he people may with much propriety commit the power to a distinct body from the legislature, the executive or judicial.

THE FEDERALIST No. 64, at 436; *see also* 1 ELLIOT, *supra* note 17, at 498 ("The proposed Government is to be the government of the people: all its offices are to be their offices, and to exercise no rights but such as the people commit to them.").

130 *See, e.g.*, THE FEDERALIST No. 84, at 578 (The Constitution is "founded upon the power of the people, and executed by their immediate representatives and servants."); THE FEDERALIST No. 28, at 178 ("[T]he whole power of the proposed government is to be in the hands of the representatives of the people.").

131 *See, e.g.*, 4 ELLIOT, *supra* note 17, at 148 (The Constitution is "a declaration of particular powers by the people to their representatives, for particular purposes."); 4 *id.* at 9-10 ("The people are known with certainty to have originated [the government] themselves. Those in power are their servants and agents. . . .").

132 *See* GWYN, MEANING, *supra* note 21, at 123-26; WOOD, *supra* note 25, at 596-606.

133 *See supra* notes 29-32, 47, 51, 75-76, 80, 87 and accompanying text.

134 U.S. CONST. art. II, §§ 1-3. The President was elected indirectly through the Electoral College, which could not include members of Congress. *Id.* This electoral system was designed to make the President independent of all but "the People," who would choose distinguished electors to select the President. *See* THE FEDERALIST No. 68, at 458-61 (Hamilton); *see also* 1 FARRAND, *supra* note 77, at 69 (Madison) (arguing that this mode of choosing the President would ensure his independence from both Congress and the states).

135 *See* 2 ELLIOT, *supra* note 17, at 253 (Hamilton); *see also* 4 *id.* at 74 (Iredell); THE FEDERALIST No. 70, at 472, 476-80 (Hamilton); THE FEDERALIST No. 69, at 463, 470 (Hamilton); 1 WILSON'S WORKS, *supra* note 10, at 319 (The President is the "accountable magistrate of a free and great people.").

136 *See, e.g.*, 1 WILSON'S WORKS, *supra* note 10, at 329 (stressing that "the people" have "vested" in federal courts "the judicial Power of the United States"). The Court's modern justiciability doctrines, which assume that only Congress and the President represent the People, reflect a fundamental misunderstanding of the implications of popular sovereignty for judicial power. *See infra* part II.

137 Although in principle the chief officials of all government departments should have been elected so that none was dependent on another for selection, in practice the

"judicial power" as a distinct part of government (as Montesquieu recommended, contrary to English theory) and vested it in independent courts (following British practice, which Montesquieu criticized).[138] Because the judiciary could not threaten the People's liberty[139] unless it was united with executive or legislative power, the Constitution immunized federal judges from political branch influence.[140]

That independence was especially critical for courts charged with deciding "all Cases . . . arising under this Constitution"[141]—the

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People could not discern the "peculiar qualifications" needed in a judge; thus, the Constitution ensured their quality by providing for presidential appointment with the Senate's advice and consent. U.S. CONST. art. II, § 2; THE FEDERALIST No. 51, at 348 (Madison); *see also* THE FEDERALIST No. 78, at 529-30 (Hamilton) (defending this method for selecting judges).

138 *See supra* notes 34-35, 55-64 and accompanying text.

139 [T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them . . . . [It has] neither Force [*i.e.*, executive power] nor Will [*i.e.*, legislative power], but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

THE FEDERALIST No. 78, at 522-23 (Hamilton).

Hamilton asserted that "the judiciary is beyond comparison the weakest of the three departments," relying upon Montesquieu's statement that "'of the three powers above mentioned, the JUDICIARY is next to nothing.'" *Id.* at 523 (citation omitted). Hamilton distorted Montesquieu's argument, which was that the judicial power became insignificant only when it was given to temporary tribunals. To Montesquieu, vesting judicial power in permanent courts posed a grave threat to liberty. *See supra* notes 56-63 and accompanying text.

140 [T]hough individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter . . . so long as the judiciary remains truly distinct from both the legislative and executive. For I agree [with Montesquieu] that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."

THE FEDERALIST No. 78, at 523 (Hamilton).

Other leading Federalists echoed this rule-of-law theme that an independent judiciary was needed to avoid tyranny:

> [If] the legislative and judicial powers united . . . [t]he lives, liberties, and properties of the citizens would be committed to arbitrary judges, whose decisions would, in effect, be dictated by their own private opinions, and would not be governed by any fixed or known principles of law . . . . Let us suppose a union of the executive and judicial powers: this union might soon be an overbalance for the legislative authority . . . [and become] an engine of tyranny and injustice.

1 WILSON'S WORKS, *supra* note 10, at 298; *see also* THE FEDERALIST No. 47, at 326 (Madison) (quoting Montesquieu to similar effect).

Judicial independence was assured through guaranteed tenure and salary. *See* 2 ELLIOT, *supra* note 17, at 480-81, 489 (Wilson); THE FEDERALIST Nos. 78-79 (Hamilton); *see also* 1 WILSON'S WORKS, *supra* note 10, at 297 ("In their salaries, and in their offices, they ought to be completely independent: in other words, they should be removed from the most distant apprehension of being affected, in their judicial character and capacity, by any thing, except their own behavior and its consequences.").

141 U.S. CONST. art. III, § 2. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178-79 (1803) (The Framers could not have intended "[t]hat a case arising under the constitution should be decided without examining the instrument under which it arises."); BERGER,

"supreme Law."[142] As Hamilton argued, impartial judges assigned the function of expounding the law—which included the written Constitution[143]—had to invalidate political branch actions that exceeded the restrictions the People had placed on those departments.[144] Otherwise, those limitations (for example, the bars against *ex post facto* laws and bills of attainder) "would amount to nothing."[145]

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supra note 102, at 198-222 (arguing that judicial review derives from "arising under" language).

142 U.S. CONST. art VI. Article VI makes "this Constitution," which necessarily includes the limits on the political branches established in Articles I and II, "the supreme Law." Although Article VI is typically viewed through the lens of federalism, it also serves the separation-of-powers purpose of requiring federal government officials to make laws "in Pursuance" of the Constitution. *See, e.g., Marbury*, 5 U.S. (1 Cranch) at 180; BERGER, *supra* note 102, at 228-34; 4 ELLIOT, *supra* note 17, at 178-79 (Iredell); WILLS, *supra* note 42, at 143; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 2-5 (1959). For contrary arguments, see, e.g., BICKEL, *supra* note 5, at 8-11; Dean Alfange, Jr., Marbury v. Madison *and Original Understandings of Judicial Review*, 1993 SUP. CT. REV. 329, 417-18 [hereinafter Alfange, *Marbury*].

143 "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law." THE FEDERALIST No. 78, at 525 (Hamilton); *see also* REDISH, *supra* note 7, at 79-80 (A written constitution is positive law that imposes concrete limits on the government.).

144 Hamilton based judicial review on the "general theory of a limited constitution." THE FEDERALIST No. 81, at 543; *see also* THE FEDERALIST No. 78, at 526 (Independent courts are "the bulwarks of a limited constitution against legislative encroachments."); *id.* at 525 ("[C]ourts were designed to be an intermediate body between the people and the legislature . . . to keep the latter within the limits assigned to their authority."). *See generally* REDISH, *supra* note 7, at 79-84 (Judicial review by an independent judiciary is not compelled by the Constitution's text or history, but rather is a logical and practical necessity to maintain limited democracy under a written constitution.); Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 599-600 (1986) (asserting that the American invention of judicial review was essential to maintain its limited Constitution based on separation of powers).

145 THE FEDERALIST No. 78, at 524 (Hamilton). Hamilton argued that "[l]imitations *of this kind* can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void." *Id.* (empbasis added). This statement could be interpreted to mean that judicial review would be warranted only to uphold those few constitutional provisions that expressly prohibit Congress from infringing individual rights, *i.e.*, the prohibitions against *ex post facto* laws, bills of attainder, and suspension of *habeas corpus*. *See* Anderson, *supra* note 106, at 154, 166 n.57.

Elsewhere, however, Hamilton repeatedly stressed that courts must "guard the constitution *and* the rights of individuals." THE FEDERALIST No. 78, at 527 (emphasis added); *see also id.* at 529. This language suggests that some enforceable constitutional provisions do not involve individual rights. *See* Theodore Y. Blumoff, *Judicial Review, Foreign Affairs and Legislative Standing*, 25 GA. L. REV. 227, 256-58 (1991); *cf.* Amar, *Sovereignty*, *supra* note 13, at 1440 (The limitations on the national government consist of both express prohibitions and finite delegations of power.). Moreover, nothing in the Constitution implies that only its clauses protecting individual liberty—rather than its structural principles like separation of powers—bind the political branches. On the contrary, the original Constitution consisted almost entirely of structural provisions desigued to prevent tyranny (and thus lacked a Bill of Rights), which suggests that the Framers contemplated that judicial review would extend to such structural matters. *See* REDISH, *supra* note 7, at 83-84. *See generally infra* notes 457-64 and accompanying text (criticizing the modern Court's standing doctrine, which presumes that the Constitution's structural provisions are judicially unenforceable).

Indeed, under the rule-of-law maxim that "no man ought certainly to be a judge in his own cause, or in any cause in . . . which he has the least interest or bias,"[146] only courts could fairly adjudicate cases challenging an act of Congress or the President's execution of that statute.[147] Hamilton captured this rationale and foreshadowed the political question doctrine:

> If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not collected from any particular provisions in the constitution.[148]

Moreover, judicial review was perfectly consistent with popular sovereignty, for it

> [does not] suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former.[149]

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146 THE FEDERALIST No. 80, at 538 (Hamilton); *see also* THE FEDERALIST No. 10, at 59 (Madison) ("[N]o man is allowed to be a judge in his own cause.").

147 *See* THE FEDERALIST No. 78, at 524-25 (Hamilton); *see also* REDISH, *supra* note 7, at 5, 81 (The rule of law dictates that the independent judiciary have final interpretive authority over the Constitution.); WILLS, *supra* note 42, at 133, 148-50 (linking the rule of law to the judiciary's power to review legislative acts); Verkuil, *supra* note 43, at 304, 308, 322 (asserting that an impartial judiciary is the key to the rule of law). This rationale also required independent courts—not the political departments—to decide controversies in which the United States itself was a party. *See* THE FEDERALIST No. 80, at 534, 540 (Hamilton).

The rule of law suggests that the Court cannot ultimately judge its own Article III powers. *See* Alfange, *Marbury*, *supra* note 142, at 431-33 (Because the Constitution limits all the branches, giving unreviewable authority to any one department (*e.g.*, the judiciary) to interpret the entire Constitution would enable that branch to ignore the limits the Constitution places on its power.). However, the rule of law recognizes a "necessity" exception, and the need to ensure judicial independence might require not permitting the political branches to have the final say on the constitutional limits to judicial power. *See* REDISH, *supra* note 7, at 82.

148 THE FEDERALIST No. 78, at 524-25 (Hamilton). Thus, Hamilton acknowledged that the rule-of-law presumption favoring judicial review of political branch acts can be rebutted where the Constitution itself precludes judicial involvement—subjects that came to be deemed "political questions." *See generally infra* part I.C.4 (describing the development of the political question doctrine by Federalist Justices). Modern scholars have ignored this passage in arguing that Hamilton advocated judicial review of the entire Constitution; on the contrary, he recognized exceptions for certain provisions. *See generally infra* part II.B.4 (contending that the reintroduction of Hamilton's "rebuttable presumption" analysis would clarify the political question doctrine).

149 THE FEDERALIST No. 78, at 525 (Hamilton).

> No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that . . . the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid . . . .

Hamilton expressed the shared understanding about judicial review.[150]

c. *Limits on Judicial Power*

Neither judicial review nor the power to interpret harsh statutes equitably[151] made federal courts omnipotent. Like all government

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> [T]he Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Id. at 524-25; *see also* THE FEDERALIST No. 53, at 360-61 (Madison) (The Constitution is "established by the people, and unalterable by the government," which is limited "by the authority of a paramount constitution."); 2 FARRAND, *supra* note 77, at 73-74, 76, 78 (Madison) (approving judicial review and denying that it made judicial power supreme over legislative); *see also* WILLS, *supra* note 42, at 126-35, 156-61 (explaining Publius's argument that the direct, democratic legislative act of ratifying the Constitution prevailed over the indirect act of statute-making); *see generally* ACKERMAN, *supra* note 13, at 191-94 (contending that judicial review prevents Congress from changing the People's Constitution through ordinary lawmaking).

Wilson had set forth a similar argument at the Pennsylvania ratifying convention—that the power of the People expressed in the Constitution was superior to mere legislative acts, and therefore independent federal judges had to invalidate laws that exceeded constitutional boundaries. *See* 2 ELLIOT, *supra* note 17, at 445-46, 478, 489; *see also* 2 FARRAND, *supra* note 77, at 73, 391 (Wilson); 1 WILSON'S WORKS, *supra* note 10, at 43, 186, 300, 329-30; 2 *id.* at 455-56.

150 *See supra* notes 91-92, 149 (describing approval of judicial review by Madison and Wilson). At the Convention, judicial review was accepted by delegates of all political stripes. *See* Engdahl, *supra* note 91, at 283-84; Pushaw, *supra* note 36, at 492 (citing sources). The only question was whether federal courts needed the additional power of serving with executive officials on a Council of Revision to review the wisdom and justice of legislative bills. *See* Pushaw, *supra* note 36, at 482 n.178, 490-91; Sharp, *supra* note 72, at 424-25; *see also* WILLS, *supra* note 42, at 151 (arguing that Madison clearly accepted judicial review at the time of the framing, but may have changed his mind later during Jefferson's conflict with the federal courts). During Ratification, both sides agreed that the Constitution authorized judicial review. The dispute was whether this power was a reason to ratify it (as the Federalists argued) or reject it (the Antifederalist position). *See, e.g.*, Engdahl, *supra* note 91, at 284 nn.9-10 and accompanying text. After the Constitution had been ratified, however, it could not reasonably be argued that this power was not conferred. *See* WILLS, *supra* note 42, at 130.

Significantly, no future Supreme Court Justice who participated in either the framing or ratification of the Constitution denied the power of judicial review, and many expressly defended it. *See, e.g.*, *supra* notes 16, 91 (Iredell); *supra* note 17 (Marshall); *supra* note 91 (Blair); *supra* note 129 (Jay); *supra* note 149 (Wilson); *see also* 2 ELLIOT, *supra* note 17, at 196 (Ellsworth).

In short, the evidence overwhelmingly demonstrates the contemporaneous understanding that the Constitution included the power of judicial review. *See* BERGER, *supra* note 102. The problem is not the existence of this power, but rather its exercise, which has not conformed to the original understanding that it would be used only to negate clear violations of the Constitution.

151 *See, e.g.*, THE FEDERALIST No. 78, at 528 (Hamilton) (Where particular "classes of citizens" were injured "by unjust and partial laws," judicial independence was "of vast importance in mitigating the severity, and confining the operation of such laws."); 2 WILSON'S WORKS, *supra* note 10, at 478, 486 (approving equitable interpretation of statutes); Rutgers v. Waddington (N.Y. City Mayor's Ct. 1784) (unreported) (Duane, C.J.), *reprinted in* 1 JULIUS GOEBEL, THE LAW PRACTICE OF ALEXANDER HAMILTON 393-419 (1964) (disregarding a general statute the effect of which in a particular case was deemed unreasonable and unin-

agents, judges were "limited" in the sense that they could exercise only those powers delegated by the People. Article III granted federal courts exclusively "judicial" power, which imported two major restrictions. First, courts could act not on their own initiative but only at the request of a party in a public "judicial" proceeding[152]—for example, a prerogative writ procedure, an informer or relator action, a private law cause of action, an appeal, or any other recognizable judicial form.[153] Second, judges had authority to expound existing law, not to make new law.[154] Thus, courts could only invalidate statutes that

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tended by the legislature because it conflicted with both the law of nations and a treaty); *see also supra* note 36 (describing equitable interpretation power in England).

152 During the Convention, a colloquy between Madison and Johnson over extending federal jurisdiction to cases arising under the Constitution ended with the observation that it was "generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature." 2 FARRAND, *supra* note 77, at 430. This comment suggests a shared understanding that constitutional adjudication would be restricted to familiar judicial forms.

153 "Judicial power" included not only private law disputes, but also public law actions challenging allegedly illegal government conduct that did not affect a plaintiff's personal interests. *See supra* notes 37-38. For example, English and pre-1787 American practice permitted legislatures to authorize informer and relator suits. *See supra* note 38. Congress has granted federal courts such jurisdiction since the beginning of the Republic without any real question as to constitutionality. *See generally* Winter, *supra* note 33, at 1406-08 (discussing informer actions in early state and federal practice).

Prerogative writs (*e.g.*, mandamus, certiorari, and quo warranto), however, raise the more difficult issue of whether judicial power to use them is inherent or must be authorized by statute. The King's Bench, which assisted the Crown in exercising executive power, had discretion to grant prerogative writs against executive officials and lower courts (as opposed to Parliament or the king himself) who exceeded their legal authority or failed to perform their duties. *See supra* note 33. Because America lacked royalty and severed the judiciary from the executive, federal courts did not have an English-style "prerogative" to issue writs. Thus, writs seemingly had to be authorized by Congress.

Such control raises potentially grave separation-of-powers problems because Congress could violate the Constitution with impunity in many instances simply by withholding writ power. In this vein, Professor Berger has argued that the Framers intended to retain all traditional judicial mechanisms to check legislative oppression, including discretionary prerogative writs. Berger, *supra* note 33, at 827-40. If Berger was suggesting that federal courts have inherent "judicial power" to issue such writs directly to members of Congress, that would have been a sharp break from the tradition that writs did not lie against legislators. But if he meant that a citizen should be able to obtain a prerogative writ against an executive officer who is attempting to implement a statute that allegedly exceeds Congress's enumerated powers, that would be consistent with both established practice and Federalist separation-of-powers principles. The First Congress avoided constitutional conflicts on this issue by granting federal courts general prerogative writ authority. *See infra* note 197.

154 *See, e.g.*, 2 WILSON'S WORKS, *supra* note 10, at 502 (A judge's duty is "not to make the law, but to interpret and apply it."). *See generally* Engdahl, *supra* note 91, at 294-96 (summarizing statements of this concept); *id.* at 289-97 (maintaining that Federalists did not anticipate the difficulty of applying the law-interpretation model to the Constitution or how politics would influence constitutional decisions).

Professor Redish bas argued that the judicial function is further limited to the resolution of a live, adversary dispute. REDISH, *supra* note 7, at 5, 88-90, 104, 109. Although I concur with Redish that a live dispute is a *sufficient* predicate for the exercise of judicial power, I disagree that it is a *necessary* precondition. *See* Pushaw, *supra* note 36; *see also supra* notes 33, 37-38, 153 and accompanying text.

clearly conflicted with the Constitution.[155] Correspondingly, judges had to construe laws to avoid constitutional questions[156] and could not

> on the pretence of a repugnancy, . . . substitute their own pleasure to the constitutional intentions of the legislature . . . . The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.[157]

As long as federal courts exercised only "judicial" power within Article III's enumerated categories,[158] however, they were not "limited" in the sense of occupying an inferior position in the tripartite system. On the contrary, the Constitution created, in Madison's words, three "perfectly co-ordinate" branches.[159]

2. *Checking and Balancing the Federal Government's Power*

Madison and his colleagues did not simply "mark with precision the boundaries of the[ ] departments in the Constitution" and "trust . . . these parchment barriers" to prevent one branch from exceeding its limits or usurping another's authority.[160] Nor did they include in the Constitution a provision requiring absolute separation of powers, for Montesquieu and his model government, England, had recog-

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155 *See* THE FEDERALIST No. 78, at 525 (Hamilton) (stating that only an "irreconcilable variance" between the Constitution and a statute would justify invalidation of the latter); *id.* at 524 (Federal courts must "declare all acts contrary to the manifest tenor of the constitution void."); THE FEDERALIST No. 81, at 543 (Hamilton) (Courts must void statutes that are in "evident opposition" to the Constitution.). *See* Engdahl, *supra* note 91, at 289-90 (citing sources).

156 This interpretive canon reflects the general principle that judges should harmonize two apparently conflicting laws "[s]o far as they can by any fair construction be reconciled with each other." THE FEDERALIST No. 78, at 525-26 (Hamilton).

157 *Id.* at 526 (Hamilton). One means of inhibiting such judicial usurpation was the requirement that judges provide reasons for their decisions. *See supra* note 39 and accompanying text.

158 *See* U.S. CONST. art. III, § 2, cl. 1; *see also* THE FEDERALIST No. 83, at 560 (Hamilton) (Federal courts are limited to "certain cases particularly specified."); THE FEDERALIST No. 80 (Hamilton) (same).

159 THE FEDERALIST No. 49, at 339 (Madison). The foregoing discussion refutes the contention that judicial review is illegitimate because "the theoretical and historical evidence is that popular sovereignty and self-government have always been coincident with legislative supremacy." Anderson, *supra* note 106, at 152. The modern justiciability doctrines pervert Madisonian ideas by positing a uniquely limited, rather than coordinate, role for federal courts. *See infra* part II.

160 *See* THE FEDERALIST No. 48, at 332-33 (Madison); *see also id.* at 338 ("[A] mere demarkation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."); THE FEDERALIST No. 49, at 341 (Madison) (same).

nized the "impossibility and inexpediency" of "totally separate and distinct" branches.[161] Rather, the Constitution

> maintain[s] in practice the necessary partition of power among the several departments . . . by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.[162]

This structure rests on each branch's independence and on their different constituencies, main functions, and modes of action.[163]

The Framers also gave each department the means to resist encroachments through checks—specific, limited rights to share in (or interfere with) the functions of another branch.[164] The Federalists adopted and modified the two classic English checks. First, like the king, the President had discretion to veto legislation, but this power

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161 THE FEDERALIST No. 47, at 324-27 (Madison). The First Congress's rejection of an explicit constitutional provision requiring separation of powers reflects a desire to maintain flexibility in blending certain governmental functions. *See infra* notes 162-63, 170 and accompanying text; Casper, *supra* note 72, at 221-22, 235-36. Consequently, there can be no doctrine of separation of powers in the same sense as, for example, there is a doctrine of due process. Rather, separation of powers is a structural principle based on a theory of government. *See* Kurland, *supra* note 144, at 602-03; Verkuil, *supra* note 43, at 307; *see also* 1 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 40 (3d ed. 1994); E. Donald Elliott, *Why Our Separation of Powers Jurisprudence is So Abysmal*, 57 GEO. WASH. L. REV. 506 (1987).

162 *See* THE FEDERALIST No. 51, at 347-48 (Madison); *see also* ACKERMAN, *supra* note 13, at 188-91, 224, 252 (explaining that the division of powers and checks and balances were intended to prevent factions from subverting the general good of the People); VILE, *supra* note 21, at 122, 134, 144, 153-54, 157, 160 (The Framers' achievement was the creation of a practical system of government fusing separation of powers with checks and balances.).

163 *See supra* part I.B.1.a; *see also* Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1258-72 (1988) (arguing that the Founders promoted accountability primarily by limiting each branch to a specific mode of action in exercising its core function).

164 [T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others . . . . A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.

> [The Constitution's] policy of supplying . . . opposite and rival interests . . . aim[s] . . . to divide and arrange the several offices in such a manner as that each may be a check on the other . . . .

THE FEDERALIST No. 51, at 349 (Madison); *see also* THE FEDERALIST No. 48, at 332 (Madison) ("[U]nless these departments be so far connected and blended, as to give each a constitutional controul over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice, be duly maintained."); 4 ELLIOT, *supra* note 17, at 74 (Iredell) (pointing out that separation of powers "would have very little efficacy if each power had no means to defend itself against the encroachments of the others"); 2 *id.* at 510-11 (Wilson) (same); 2 *id.* at 302 (Hamilton); *see also* WILLS, *supra* note 42, at 119 ("Checks and balances have to do with corrective invasion of the separated powers."); Amar, *Sovereignty*, *supra* note 13, at 1143-44 (describing the nature and purpose of checks).

could now be overridden by a two-thirds vote of Congress.[165] Second, the Constitution incorporated British impeachment procedures, authorizing the lower legislative house to impeach executive officials and judges and the upper chamber to exercise judicial power by trying these cases and rendering a final, unreviewable judgment.[166] Un-

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165 U.S. CONST. art. I, § 7, cl. 2; *cf. supra* note 51 and accompanying text (discussing the king's absolute veto). Federalists argued that this limited veto was more consistent with separation of powers because Congress retained ultimate legislative authority; the President could merely force bills to be reconsidered, thereby improving their quality. *See, e.g.*, 2 ELLIOT, *supra* note 17, at 446-47 (Wilson) (The president's "qualified negative" helps to restrain legislative power and produce better laws.); THE FEDERALIST No. 73 (Hamilton) (contending that the limited veto protects the President against legislative usurpation and promotes stable laws); 4 ELLIOT, *supra* note 17, at 74-75 (Iredell) (same); *see also* WOOD, *supra* note 25, at 435-36, 452-53, 552-53, 587; *infra* note 552 and accompanying text (showing that the President's exercise of the veto power is not judicially reviewable).

166 U.S. CONST. art. I, § 2, cl. 5; U.S. CONST. art. I, § 3, cl. 6; *see also* THE FEDERALIST No. 65, at 440 (Hamilton) (stressing the Framers' adoption of the English impeachment model); *id.* at 440 (Dividing prosecutorial and judging functions between the legislative houses promotes fairness.); *supra* note 52 (explaining British impeachment proceedings). Impeachment was limited to "[o]fficers of the United States" accused of "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. art. II, § 4.

Federalists viewed impeachments as inherently political and hence committed to the complete discretion of the most political branch, the legislature. *See, e.g.*, THE FEDERALIST No. 65, at 439-40 (Hamilton) (Impeachments "may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself," and thus are left to Congress.); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 744-45, 748, 762-64, 783, 795, 798, 801 (1833); 1 WILSON'S WORKS, *supra* note 10, at 324, 399; *see also* Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After* Nixon, 44 DUKE L.J. 231, 255-57 (1994) (demonstrating the Framers' consensus that impeachment was entrusted solely to Congress).

In impeachment proceedings, the Senate (like the House of Lords) acts as a "court" exercising "judicial power": The Senate must "try" impeachments and can "convict[ ]" federal officers by rendering a "Judgment" in a "Case[ ]." U.S. CONST. art. I, § 3, cls. 6-7; *see also* CHARLES L. BLACK, JR., IMPEACHMENT 9-10 (1974) (arguing that the Senate functions as a judicial tribunal in impeachments); Fritz Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 539-40 (1966) (same). Federalists understood that a court's judicial judgments are final and unreviewable, even where the tribunal happens to be composed of legislators. *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 398 (1798) (Iredell, J.); *see also* 2 STORY, *supra*, § 803, at 273 ("[T]he final decision of [constitutional questions] . . . may be reasonably left to the high tribunal, constituting the court of impeachment."); 2 *id.* § 809, at 277 ("[J]udgments upon impeachment . . . when once pronounced . . . become absolute and irreversible."); Vik D. Amar, Note, *The Senate and the Constitution*, 97 YALE L.J. 1111, 1114-15 (1988) (noting res judicata effect of impeachment court's judgment).

Finally, analysis of Article III reinforces the conclusion that the judiciary cannot interfere with impeachment determinations. Section 2, Clause 1 grants "judicial Power" to federal courts in nine specified categories, which do not include impeachments; impeachment is treated separately. *See* U.S. CONST. art. III, § 2, cl. 3 (excepting "Cases of Impeachment" from the guarantee of a jury trial). Nor can the Court review impeachments pursuant to its appellate jurisdiction over federal question "Cases, in Law and Equity," because impeachments fall into neither category. *See* BLACK, *supra*, at 55-56 (arguing that Article III grants the Supreme Court neither original nor appellate jurisdiction over impeachments); Gerhardt, *supra*, at 234, 261, 272-73 (same).

like the House of Lords, which could impose criminal penalties, the Senate could only remove and disqualify a guilty official.[167]

The Constitution also required the President to share with the Senate certain powers formerly considered exclusively executive—for example, appointing federal officers and judges[168] and conducting

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In short, there is no affirmative texttual or historical evidence that the Framers expected federal courts to have any role in adjudicating impeachments. *See* Gerhardt, *supra*, at 252-57; *see also* BLACK, *supra*, at 23-24, 59-61.

Nevertheless, Professor Berger has argued that, in establishing judicial review as a check on legislative abuses, the Framers intended no exception for impeachments. *See* BERGER, *supra* note 52, at 103-20. He deems unreviewable congressional power over impeachments to be unthinkable under our Constitution's limited government based on separation of powers. *Id.* at 116-18. For example, Berger quotes Hamilton's statement that "it 'cannot be the natural presumption' that the 'legislative body are themselves the constitutional judges of their own powers . . . It is far more rational to suppose that the courts were desigued . . . to keep the [legislature] within the limits assigued to their authority.'" *Id.* at 116 n.62 (quoting THE FEDERALIST No. 78). Berger's ellipsis, however, deletes the crucial qualifier that this "presumption" can be overcome by "particular provisions in the constitution." THE FEDERALIST No. 78, at 525 (Hamilton); *see also supra* note 148. Although Hamilton did not specify which constitutional provisions he had in mind, the clauses from Articles I, II, and III cited above suggest that impeachments were an obvious example—a conclusion buttressed by Hamilton's analysis of impeachment elsewhere. *See, e.g.*, THE FEDERALIST No. 65, at 439-41; THE FEDERALIST No. 79, at 532-33; THE FEDERALIST No. 81, at 545-46 (explaining that lodging the power to impeach, try, and punish judges solely in Congress constitutes an effective check against judicial misconduct).

Similarly, Professor Berger quotes Justice Iredell's statement that "'[t]he whole judicial power of the government is vested in the judges of the United States . . . to themselves it belongs to explain the law and the Constitution.'" BERGER, *supra* note 52, at 111 n.43 (citing Iredell's jury instruction in a 1799 case). Elsewhere, however, Iredell recognized an exception for impeachment. *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 398 (1798) (Iredell, J.); Hayburn's Case, 2 U.S. (2 Dall.) 409, 413 n.(a) (C.C.D.N.C. 1792).

Thus, even those Federalists most committed to judicial review (*e.g.*, Hamilton, Iredell, and Story) understood that this practice did not include impeachments, and their practical and theoretical arguments make as much sense today as they did two centuries ago. *See infra* notes 553-58 and accompanying text.

167 U.S. CONST. art. I, § 3, cl. 7. Impeachable conduct that also constituted a crime was subject to a separate proceeding in an ordinary court. *Id.* This arrangement promoted the rule of law by providing the accused official with two different decisionmakers, rather than "making the same persons Judges in both cases." *See* THE FEDERALIST No. 65, at 442 (Hamilton).

Another modification of English practice was that the Chief Executive could now be impeached. U.S. CONST. art. I, §§ 2-3; U.S. CONST. art. II, § 4. *See, e.g.*, 2 FARRAND, *supra* note 77, at 64-69, 551 (discussing the need to allow impeachment of the President); *cf. supra* note 52 (noting the king's immunity from impeachment).

168 U.S. CONST. art. II, § 2, cl. 2. Appointment was traditionally viewed as a core executive power intimately related to executing the laws, as leading Federalists acknowledged. *See* 1 FARRAND, *supra* note 77, at 66 (Wilson) (The only powers "strictly Executive were those of executing the laws, and appointing officers."); *see also* 1 ANNALS OF CONG. 463 (Madison) (J. Gales ed., 1789). Nonetheless, they defended the Senate's role in appointments as fostering deliberative choices that in turn would lead to good administration. *See, e.g.*, THE FEDERALIST No. 76, at 513 (Hamilton).

foreign affairs.[169] In short, the politically accountable branches shared responsibility for policymaking.[170]

By contrast, the Framers deliberately excluded judges from compulsory participation in making or executing federal law.[171] For ex-

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169 For example, Congress was granted the traditional "executive" power to declare war. U.S. CONST. art. I, § 8, cl. 11; *see also* Gwyn, *Indeterminacy*, *supra* note 26, at 266 n.16. Congress also has the authority to create, fund, and regulate the armed forces and the militia. U.S. CONST. art. I, § 8, cls. 12-16. The President, however, was made Commander-in-Chief. U.S. CONST. art. II, § 2, cl. 1. *See* THE FEDERALIST Nos. 69, 74 (Hamilton) (describing the President's role as Commander-in-Chief).

Similarly, the President has the power to make treaties, but only with the Senate's advice and consent and the concurrence of two-thirds of its members. U.S. CONST. art. II, § 2, cl. 2. The Framers believed that involving the Senate in the treaty-making process ensured its deliberativeness and promoted cooperation. *See, e.g.*, THE FEDERALIST No. 75 (Hamilton); THE FEDERALIST No. 64 (Jay); 2 ELLIOT, *supra* note 17, at 466, 505-07 (Wilson); *see also* Casper, *supra* note 72, at 243-49, 256-57. *See generally* Blumoff, *supra* note 145, at 236-39 (demonstrating that the Founders defined foreigu affairs powers in general terms to ensure coordinated action).

The mingling of these functions reflected uncertainty about whether they were legislative or executive. *See* VILE, *supra* note 21, at 156-57. For example, although English treaty-making had been committed to the king, it was really a legislative act of creating rules. *See, e.g.*, 1 FARRAND, *supra* note 77, at 65-66 (Wilson); 6 MADISON PAPERS, *supra* note 93, at 145; Alfange, *Normalcy*, *supra* note 76, at 672. Moreover, this functional sharing expressed the Framers' rejection of the English model of massive executive prerogative powers. *See* Monaghan, *Protective*, *supra* note 109, at 17. *See generally infra* notes 559-67 and accompanying text (arguing that the exercise of these former prerogative powers almost always presents a political question).

170 *See, e.g.*, Alan L. Feld, *Separation of Political Powers: Boundaries or Balance?*, 21 GA. L. REV. 171 (1986) (The Constitution entrusts policy decisions to officers who are accountable through the democratic process.); *see also* REDISH, *supra* note 7, at 4-5, 9-29, 33, 45, 49-50, 71-74. More precisely, the Framers gave Congress the ultimate power to determine national policy, but enabled the President to stimulate the exercise of that power through recommendations, the veto, and other devices. *See* Monaghan, *Protective*, *supra* note 109, at 20.

The Founders eschewed rigid definitions of governmental power in the Constitution because of the need for some functional overlap and because of the practical difficulty of classifying certain governmental activities (*e.g.*, the exercise of discretion) as "legislative," "executive," or "judicial." *See, e.g.*, THE FEDERALIST No. 37, at 235 (Madison). For example, if the Constitution had expressly defined "legislative power" as the authority to enact laws and had given Congress only that power, that would have conflicted with its grant to Congress of the "judicial" power of impeachment and the "executive" power to declare war.

These limited exceptions, designed to promote checks and balances, do not mean that "separation of powers was abandoned in the framing of the Constitution," as some have concluded. *See, e.g.*, FORREST MCDONALD, NOVUS ORDO SECLORUM 258 (1985). On the contrary, separation of powers is "entirely compatible with a partial intermixture of th[e] departments for special purposes, preserving them in the main distinct and unconnected." THE FEDERALIST No. 66, at 445 (Hamilton). *See generally supra* notes 161-62 (explaining why checks do not vitiate separation); Osgood, *supra* note 73, at 285-86 (The Constitution "represents a serious commitment to separated powers, while also specifying some obvious examples of sharing of powers.").

171 Although "courts" in the exercise of their "judicial" power can have no interaction with the political branches, judges acting in their individual capacities could voluntarily perform extra-judicial services if doing so would not threaten their basic function of deciding cases impartially. *See, e.g.*, 2 ELLIOT, *supra* note 17, at 514 (Wilson); Wheeler, *supra* note 113, at 126-31.

ample, the Convention rejected the Council of Revision—a judicial-executive committee authorized to review and amend legislative bills—on the grounds that judges should avoid partisan policymaking and possible "improper bias from having given a previous opinion in their revisionary capacities" on a law they then had to interpret.[172]

Similar separation-of-powers concerns doomed two other proposals: first, a suggested Privy Council composed of executive department heads and the Chief Justice, from whom the President could demand written opinions and other assistance;[173] second, a provision authorizing the political departments to require advisory opinions from the Court.[174] Finally, the judiciary was the only branch given no true check (*i.e.*, a share in a function it did not inherently possess), but rather could thwart unconstitutional conduct by Congress or the President only by exercising "judicial" power.[175] Conversely, the political

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172 THE FEDERALIST No. 73, at 499 (Hamilton); *see also* THE FEDERALIST No. 81, at 543-44 (Hamilton) (arguing that the Constitution comports better with separation of powers than the English system, in which the House of Lords has supreme power to interpret laws it had assisted in enacting); 1 WILSON'S WORKS, *supra* note 10, at 324. *See generally* Pushaw, *supra* note 36, at 491 nn.222-23 (discussing why the Convention rejected the Council of Revision); Calabresi & Prakash, *supra* note 29, at 632 (same).

173 Ellsworth, Morris, and Pinckney recommended such a Council. *See* 2 FARRAND, *supra* note 77, at 328-29, 342-44; *see also* 2 *id.* at 342 (proposing that the Chief Justice also be able to suggest alterations to federal laws). The Committee of Detail endorsed an advisory Privy Council with a similar membership, but added the House Speaker and the President of the Senate. 2 *id.* at 367. This provision for a Council was later deleted in favor of a clause authorizing the President to obtain opinions from his executive department heads. *See* 2 *id.* at 495.

Although no explanation accompanied this change, it appears to reflect two separation-of-powers concerns. First, participation in the Council would have threatened not only the Chief Justice's independence from the executive but also the impartiality of his exposition of laws on which he had previously written an opinion. 2 *id.* at 329 (recounting Gerry's opposition to the Chief Justice's membership on the Council because it would cause political entanglements and neglect of judicial duties); *see also* PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 7-8 (3d ed. 1988) [hereinafter HART & WECHSLER]. Second, by requiring the President to get opinions from executive officials only, the Opinions Clause of Article II promotes the independence and unity of the executive branch and the President's accountability. *See* Calabresi & Prakash, *supra* note 29, at 584, 628-29, 631-34.

174 *See* 2 FARRAND, *supra* note 77, at 334 ("Each Branch of the Legislature, as well as the supreme Executive shall have authority to require the opinions of the supreme Judicial Court upon important questions of law, and upon solemn occasions."). *See generally infra* part I.C.2 (arguing that the Federalist Court's 1793 decision declining to give advice to President Washington reflected the Convention's rejection of a Council of Revision, a Privy Council, and advisory opinion practice).

175 *See* Anderson, *supra* note 106, at 153-54; *supra* notes 164, 171-74 and accompanying text. Judicial review was a "check" in the broader sense of being a mechanism for restraining excesses by other government branches and preventing their encroachment on the judiciary. *See, e.g.*, 2 ELLIOT, *supra* note 17, at 196 (Ellsworth) (referring to judicial review as "a constitutional check"); 2 *id.* at 445 (Wilson) ("[T]he legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department."); THE FEDERALIST No. 78, at 524-26 (Hamilton) (to similar effect); VILE, *supra* note

branches could not interfere with judicial power over a particular matter (for instance, by revising a court's final order).[176]

Nonetheless, the Constitution does impose several political constraints on the judiciary.[177] For example, Congress can (1) remove federal judges for misconduct;[178] (2) control federal court personnel and jurisdiction;[179] and (3) spearhead amendments to overturn

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21, at 157-58 (Judicial review relates to the idea that one branch has a limited right to interfere with another's function to keep it within its bounds.).

Professor Paulsen has argued that, consistent with the Federalist Constitution's separation of powers among coordinate, independent branches, the authority to interpret federal law is not specifically delegated to the judiciary, but rather is implied as a necessary incident of each department's discharge of its function within the sphere of its enumerated powers. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994). Thus, he contends that the President has independent interpretive authority while exercising his Article II powers—including the right to decline to enforce a judicial decree rendered in a case within a court's jurisdiction. *Id.* at 222-23, 226, 241-63, 276-82, 294-300, 303-06, 343-44.

I disagree. Article III gives federal courts "the judicial power," which in 1789 was universally defined as the authority to interpret and apply the law in specific cases. *See supra* notes 35-36, 39, 112-13, 143, 154, 172 and accompanying text. In contrast to this express grant of interpretive power to the judiciary, any such authority in the political branches can only be implied as incidental to performance of their core functions—Congress's "legislative power" to make law and the President's "executive power" to administer it. *See supra* notes 27-32, 106-11 and *infra* notes 193-94, 205-06 and accompanying text. Similarly, Paulsen's claim that the executive can refuse to execute a court's judgment conflicts with overwhelming evidence that the Framers understood "judicial power" to require that an order in a particular case be treated as final and unreviewable by the political organs. *See supra* notes 45, 99, 116, 146-48, 176 and accompanying text; *see also infra* notes 209-11 and accompanying text.

176 *See, e.g.*, THE FEDERALIST No. 81, at 545 (Hamilton) (Neither British nor American constitutions "authorise[ ] the revisal of a judicial sentence, by a legislative act . . . . A legislature without exceeding its province cannot reverse a determination once made, in a particular case . . . ."); *id.* at 544 (decrying the "absurdity in subjecting the decisions of men selected for their knowledge of the laws, acquired by long and laborious study [*i.e.*, judges], to the revision and control of men, who for want of the same advantage cannot but be deficient in that knowledge [*i.e.*, legislators]"). *See generally supra* note 45 (describing the importance of the finality of judicial orders); *infra* notes 209-10 (discussing the Court's adoption of this principle in 1792).

177 One obvious control is that the President appoints federal judges with the advice and consent of the Senate. U.S. CONST. art. II, § 2, cl. 2. But the judges, once confirmed, become independent. *See* THE FEDERALIST No. 51, at 348 (Madison). Thus, additional checks were needed.

178 Hamilton identified impeachment as an "important constitutional check"—indeed, "a complete security" against judicial usurpation. THE FEDERALIST No. 81, at 545-46.

179 Congress has the power to make "Exceptions" and "Regulations" to the Supreme Court's appellate jurisdiction. U.S. CONST. art. III, § 2, cl. 2. It also may establish inferior federal courts. U.S. CONST. art. I, § 8; U.S. CONST. art. III, § 1. The Court and most scholars have interpreted these provisions as giving Congress plenary power over federal court jurisdiction, although some have argued that Congress's control over jurisdiction is not absolute. *See* Amar, *Neo-Federalist*, *supra* note 13.

Professors Levit and Redish have contended that separation of powers prohibits judges from creating discretionary doctrines such as abstention and justiciability to avoid exercising jurisdiction conferred on them in a constitutionally valid statute. *See* Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 361 (1989); REDISH, *supra* note 7, at 4-7, 17-20, 64, 73-88.

Supreme Court decisions.[180] These checks, and the very nature of judicial power (especially its inability to impose decisions by force), eliminated any danger of encroachment on the political branches.[181]

3. *Popular Sovereignty, Separation of Powers, Checks and Balances, and the Reconciliation of Liberty and Efficiency*

The Constitution enables each department to exercise its core function and its checks independently, but allows the results of each's proceedings to be "examined and controlled" by the other branches.[182] For example, a statute must be (a) passed by both houses of Congress; (b) approved by the President; and (c) adjudged constitutional by the courts.[183] Such structural mechanisms minimize the likelihood of oppressive laws, thereby promoting liberty.[184] At the same time, however, the process is not so byzantine as to make the passage, execution, and adjudication of laws unduly onerous.[185] On the contrary, the Federalists strove to create a vigorous, competent government that operated smoothly.[186] Most importantly, they reaffirmed the "efficiency" principle of separation of powers by uniting executive power in one person who could act with speed, energy, and

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Although that proposition is generally true, federal courts can refrain from proceeding when other separation-of-powers considerations outweigh the need for deference to Congress. *See infra* part I.C (discussing the Federalist Court's rules for declining jurisdiction).

180 *See* WILLS, *supra* note 42, at 128.

181 *See* THE FEDERALIST No. 81, at 545-46 (Hamilton). Assuming courts stayed within those limits, they would be "the least dangerous branch," "the weakest of the three." THE FEDERALIST No. 78, at 523 (Hamilton); *see also* THE FEDERALIST No. 81, at 545 (Hamilton).

182 *See* 1 WILSON'S WORKS, *supra* note 10, at 299.

183 *See* 1 *id.* at 299-300; *see also* 2 ELLIOT, *supra* note 17, at 447 (Wilson); THE FEDERALIST No. 73, at 495-96 (Hamilton) (subjecting laws to examination by different departments decreases the likelihood of bad or oppressive laws). Treaties emerge from a similarly complicated process requiring negotiation by the President with the Senate's advice and consent, approval by two-thirds of the Senate, and interpretation by the courts. *See supra* note 169.

184 *See, e.g.*, 2 ELLIOT, *supra* note 17, at 348 (Hamilton) (The Constitution's "organization is so complex, so skillfully contrived, that it is next to impossible that an impolitic or wicked measure should pass the scrutiny with success."); *see also* Amar, *Sovereignty*, *supra* note 13, at 1504 (The Constitution's structure reflects a "libertarian bias" because it "enables each national branch to thwart a national law it deems unconstitutional."); Redish & Cisar, *supra* note 106, at 467, 477-78 (Separation of powers prevents rash government action.).

185 *See, e.g.*, 1 WILSON'S WORKS, *supra* note 10, at 300 (Checking does not cause paralysis, but merely requires government branches to move "in concert" and in a way that maximizes liberty.).

186 *See, e.g.*, 2 ELLIOT, *supra* note 17, at 301-02 (Hamilton) (emphasizing the need for strength, stability, and vigor in government); THE FEDERALIST Nos. 37-38 (Madison) (stressing energetic government); 2 ELLIOT, *supra* note 17, at 428-29 (Wilson) ("The aim of the Convention was to form a system of good and efficient government."); Louis Fisher, *The Efficiency Side of Separated Powers*, 5 J. AM. STUD. 113 (1971) (The Federalists sought to establish a national government with energy and efficiency.); WOOD, *supra* note 25, at 474 (same).

firmness.[187] The Constitution's strong national government would not threaten liberty, however, because it was founded on the People,[188] who separated, checked, and balanced its powers:[189]

> Political power was thus disembodied [from social classes] and became essentially homogeneous. The division of this political power now became (in Jefferson's words) "the first principle of a good government," the "distribution of its powers into executive, judiciary, and legislative, and a sub-division of the latter into two . . . branches." Separation of powers, whether describing executive, legislative, and judicial separation or the bicameral division of the legislature (the once distinct concepts now thoroughly blended), was simply a partitioning of political power, the creation of a plurality of discrete governmental elements, all detached from yet responsible to and controlled by the people, checking and balancing each other, preventing any one power from asserting itself too far. The libertarian doctrine of separation of powers was expanded and exalted by Americans to the foremost position in their constitutionalism. . . .[190]

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187 *See* U.S. CONST. art. II. *See, e.g.*, 1 WILSON'S WORKS, *supra* note 10, at 296 ("If . . . the executive power of government is placed in the hands of one person, who is to direct all the subordinate officers of that department; is there not reason to expect, in his plans and conduct, promptitude, activity, firmness, consistency, and energy?"); 2 ELLIOT, *supra* note 17, at 524 (Wilson) (A single executive will "secure strength, vigor, energy, and responsibility."); *see also* 2 *id.* at 480, 510-11 (Wilson); THE FEDERALIST No. 70, at 471-80 (Hamilton); 1 FARRAND, *supra* note 77, at 63-75, 109-14 (Madison); Sharp, *supra* note 72, at 385, 387, 397, 398, 413; Calabresi & Prakash, *supra* note 29, at 545 nn.4 & 6 (listing articles adopting "unitary executive" thesis).

188 *See, e.g.*, 2 WILSON'S WORKS, *supra* note 10, at 791 ("To render government efficient, powers must be given liberally: to render it free as well as efficient, those powers must be drawn from the people . . . ."); 2 ELLIOT, *supra* note 17, at 316 (Hamilton) ("There are two objects in forming systems of government—*safety* for the people, and *energy* in the administration.").

189 *See supra* text accompanying note 105 (citing Jay to this effect).

> This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed. Where this principle is adhered to; where, in the organization of the government, the legislature, executive, and judicial branches are rendered distinct; where, again, the legislature is divided into separate houses, and the operations of each are controlled by various checks and balances . . .—to talk of tyranny, and the subversion of our liberties, is to speak the language of enthusiasm.

2 ELLIOT, *supra* note 17, at 257 (Hamilton).

Indeed, far from menacing liberty, government was necessary to preserve it. *See, e.g.*, 4 *id.* at 95 (Iredell); 3 *id.* at 226 (Marshall); *see also* VILE, *supra* note 21, at 4-5 (Where sovereiguty is located in the People, government can actually increase liberty.); WOOD, *supra* note 25, at 544, 608-09 (making a similar argument).

190 *See* WOOD, *supra* note 25, at 604.

C. Early Supreme Court Decisions on Justiciability and Separation of Powers

Nearly all the early Justices had been instrumental in drafting the Constitution, ratifying it, or both,[191] and their judicial opinions adhered to the consensus that had been reached about the appropriate role of federal courts in the constitutional system of separated powers.[192] Most importantly, the Court reaffirmed the Federalist axiom that the Constitution created three functionally coextensive branches: "The object of the constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them."[193] The Justices' repeated assertions that the "judicial power" to interpret the

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191 The contributions of Jay (Chief Justice from 1789-95), Wilson (Justice from 1789-98), and Iredell (Justice from 1790-99), have been detailed in the previous section. John Marshall (Chief Justice from 1801-35) ardently supported ratification. *See supra* note 17. John Blair (Justice from 1790-96), while serving as a Virginia judge, was one of the first to approve the doctrine of judicial review. *See supra* note 91. Blair submitted a draft judiciary article at the Convention, *see* 2 FARRAND, *supra* note 77, at 432-33, and he supported ratification. *See* 1 DOCUMENTARY HISTORY, *supra* note 15, at 54.

Oliver Ellsworth was Chief Justice between Jay and Marshall. At the Convention, Ellsworth proposed a bicameral legislature to protect small states, supported a strong judiciary, and worked with Wilson on the Committee of Detail that crafted the Constitution. He also helped persuade Connecticut to ratify it. *See* 1 *id.* at 117-18. Furthermore, as a Senator, Ellsworth was the primary draftsman of the Judiciary Act of 1789. 1 *id.* at 118. Like Ellsworth, Paterson (Justice from 1793-1806) had been a small-states advocate at the Convention, as manifested in his influential New Jersey Plan. *See* 1 *id.* at 85. He helped Ellsworth write the Judiciary Act and became a "staunch federalist." 1 *id.* at 86.

192 Conventional wisdom holds that the Framers roughly outlined separation of powers in the Constitution and expected details to be worked out in practice. *See* Kurland, *supra* note 144, at 601-03; Casper, *supra* note 72. Most relevant here is the thesis that the early Justices developed, on an *ad hoc* basis, a separation-of-powers approach that distinguished the Court as an institution (which was strictly limited to the exercise of "judicial power" to decide Article III matters) from the Justices acting as individuals, who could perform a range of nonjudicial activities. Maeva Marcus, *Separation of Powers in the Early National Period*, 30 WM. & MARY L. REV. 269 (1989); *see also* Wheeler, *supra* note 113 (The early Justices exercised discretion to perform certain tasks outside the litigation context that involved the exercise of "judicial" skills when they concluded that doing so would not violate separation of powers.). Although the Framers left government officials flexibility in defining the precise contours of separation of powers (especially the line between legislative and executive action), I hope to show that the Court's early decisions on judicial review and justiciability had firm roots in previously stated Federalist principles.

As my focus is on the Court's exercise of judicial power, I will not consider the Justices' individual performance of clearly nonjudicial tasks, such as the foreign affairs service of Chief Justices Jay, Ellsworth, and Marshall. *See* Alfange, *Normalcy*, *supra* note 76, at 680 n.79.

193 Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 329 (1816). *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825) ("The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law . . . ."); *see also* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 808 (1824); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 384-99 (1821); Hayburn's Case, 2 U.S. (2 Dall.) 409, 411-14 n.(a) (1792).

law included determining whether the political branches clearly had exceeded their constitutional bounds likewise reflected shared understandings.[194] So did the Court's assumption of all jurisdiction conferred by Congress that was consistent with Article III's grant of "judicial power,"[195] which could be exercised in a variety of proceed-

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This coextensiveness principle preserved the rule of law, which was encapsulated in two maxims. First, "[t]he government of the United States has been emphatically termed a government of laws and not of men." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). Second, "[no] man [can be] a judge in his own cause." Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798). *See supra* notes 42-45, 99, 116, 146-48 and accompanying text (discussing these maxims).

194 *See Marbury*, 5 U.S. (1 Cranch) at 173-80. Before *Marbury*, the Court often had measured the validity of congressional acts against the Constitution, but had upheld them because they did not plainly violate the Constitution. *See, e.g.*, Hylton v. United States, 3 U.S. (3 Dall.) 171, 173-75 (1796) (ruling that a federal tax on carriages was not a "direct tax" required to be apportioned among the states by Article I); Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321 (1796) (sustaining a congressional restriction of appellate jurisdiction to questions of law against a claim that Article III prohibited this limitation); Turner v. Bank of N. Am., 4 U.S. (4 Dall.) 8 (1799) (upholding a statutory limit on diversity jurisdiction against a constitutional challenge). Similarly, the Court asserted the right to review allegedly unconstitutional state laws. *See, e.g., Calder*, 3 U.S. (3 Dall.) at 386 (concluding that Article I's bar on *ex post facto* laws does not prevent a state from retroactively setting aside a probate court judgment). *See generally* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 4-5 (1985) (summarizing 14 cases before *Marbury* in which the Court interpreted statutes in light of the Constitution); CHARLES WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 95-127 (1925) (demonstrating that, before *Marbury*, both the Court and Congress acknowledged the power of judicial review); Engdahl, *supra* note 91, at 285-89 (same).

The Justices emphasized that they would invalidate a statute only in a case of "a clear and unequivocal breach of the constitution, not a doubtful and argumentative application." Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800); *accord Hylton*, 3 U.S. (3 Dall.) at 175; *see also Calder*, 3 U.S. (3 Dall.) at 398-99 (Iredell, J.) (Laws could be struck down only if they conflicted with the Constitution's text, not with the judge's view of natural justice or wise policy.); Alfange, *Marbury*, *supra* note 142, at 342-44 (summarizing the Court's statements of this "doubtful case" rule before *Marbury*). *See generally* GOEBEL, *supra* note 66, at 662-773 (analyzing the early Court's constitutional and jurisdictional opinions).

195 [T]he legislature . . . unquestionably possess [the power] . . . of establishing courts in such manner as to their wisdom shall appear best, limited by the terms of the constitution only; and to whatever extent that power may be exercised, or however severe the duty they may think proper to require, the judges . . . owe implicit and unreserved obedience to it.

Hayburn's Case, 2 U.S. (2 Dall.) at 412 n.(a) (C.C.D.N.C.) (Iredell, J., and Sitgreaves, D.J.); *see also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.").

ings—for instance, private suits,[196] prerogative writs,[197] and informer and relator actions.[198]

Constitutional separation of powers did not, of course, contemplate an unbounded judiciary. Rather, separation principles led the Court to adopt three rules of self-restraint, all previously articulated by Federalists. First, the Justices would not render decisions that were subject to legislative or executive review. Second, the Court would not issue public advisory opinions. Third, it would decline to exercise judicial power if necessary to avoid unduly encroaching upon the constitutional spheres of Congress or the President.

1. *Hayburn's Case, Judicial Review, Finality, and Standing*

A 1792 statute required federal circuit courts to determine the pension eligibility of disabled veterans and authorized review by the Secretary of War and Congress.[199] In *Hayburn's Case*,[200] three circuit courts, each headed by a distinguished Federalist—Wilson,[201] Jay,[202]

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196 *See, e.g.*, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (holding that a state could be a defendant pursuant to Article III's extension of jurisdiction to "controversies between a state and a citizen of another state" in a breach of contract action).

197 The Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81-82, authorized the Supreme Court to issue writs of prohibition and mandamus in cases otherwise within its jurisdiction. Section 14 of that Act empowered all federal courts to grant prerogative writs "necessary for the exercise of their respective jurisdictions."

The early Court frequently entertained mandamus petitions. *See, e.g.*, Fitzbonne & Allard v. Judge of the District Court for the District of New York (U.S. unpublished 1800), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 15, at 328 (granting motion to show cause regarding a writ of mandamus to a district court judge to decide a naturalization case); United States v. Lawrence, 3 U.S. (3 Dall.) 42 (1795) (declining to issue mandamus to order a district court judge to change his decision about an arrest warrant); United States v. Hopkins (U.S. unpublished 1794), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 15, at 226-28, 494 (denying motion for a writ of mandamus to compel an executive commissioner to take action on a loan assertedly authorized by Congress); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); *see also infra* note 215 (discussing mandamus actions in 1793-94 against the Secretary of War). The Court also granted writs of prohibition. *See, e.g.*, United States v. Peters, 3 U.S. (3 Dall.) 121, 129 (1795). *See generally* GOEBEL, *supra* note 66, at 784-93 (describing the early Court's exercise of its supervisory authority).

198 *See, e.g.*, Winter, *supra* note 33, at 1407-09 (citing cases).

199 *See* Act of Mar. 23, 1792, ch. 11, 1 Stat. 243.

200 2 U.S. (2 Dall.) 409 (1792).

201 *See id.* at 411-12 n.(a) (C.C.D.Pa. 1792) (Wilson and Blair, JJ., and Peters, D.J.); *see also supra* note 10 (summarizing Wilson's career); *supra* notes 91, 191 (discussing Blair).

202 *See* 2 U.S. (2 Dall.) at 410 n.(a) (C.C.D.N.Y. 1791) (Jay, C.J., Cushing, J., and Duane, D.J.); *see also supra* note 15 (describing Jay's contributions to Federalist thought); *supra* note 151 (noting that Duane, while serving previously as a state judge, had been one of the first to articulate the argument for judicial review).

Jay encapsulated Federalist political theory in the first charge he gave to his Circuit Court's grand jury:

> [It is] of the last importance to a free people, that they who are vested with executive, legislative, and judicial powers should rest satisfied with their respective portions of power, and neither encroach on the provinces of each

and Iredell[203]—advised President Washington in separate opinion letters that this law was unconstitutional. These similarly reasoned opinions contain the early Court's most lucid analysis of the constitutional connections between separation of powers and judicial independence, judicial review, and justiciability.

Each opinion began with a summary of fundamental Federalist principles. "The People of the United States" established a supreme Constitution creating a national government[204] "divided into *three* distinct and independent branches . . . [with] the duty . . . to abstain from, and oppose, encroachments on either."[205] Congress alone could exercise Article I legislative powers; the President had the duty to faithfully execute the law; and only courts could exercise federal "judicial power."[206] Because this separation could be maintained only through judicial independence,[207] "neither the legislative nor the executive branches, [could] constitutionally assign to the judicial any duties, but such as are properly judicial."[208]

Contrary to these basic constitutional tenets, the Pension Act required federal courts to exercise nonjudicial power (and arrogated judicial power to the political branches) because their judgments could be

> revised and controlled by the legislature, and by an officer in the executive department. Such revision and control we deem[ ] radi-

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> other, nor suffer themselves to intermeddle with the rights reserved by the Constitution to the people.

3 JAY PAPERS, *supra* note 20, at 389.

203 *See* 2 U.S. (2 Dall.) at 412-13 n.(a) (C.C.D.N.C. 1792) (Iredell, J., and Sitgreaves, D.J.). *See supra* note 16 (recounting Iredell's achievements).

204 2 U.S. (2 Dall.) at 411 n.(a) (C.C.D.Pa.). Not surprisingly, Wilson's opinion contains repeated references to popular sovereignty. *See, e.g., id.* ("An important part of [legislative] power was exercised by the people themselves, when they 'ordained and established the constitution.'").

205 *Id.* at 410 n.(a) (C.C.D.N.Y.); *see also id.* at 412 n.(a) (C.C.D.N.C.) ("[T]he legislative, executive and judicial departments are each formed in a separate and independent manner; . . . the ultimate basis of each is the constitution only, within the limits of which each department can alone justify any act of authority.").

206 *See id.* at 411 n.(a) (C.C.D.Pa.).

207 In the words of the Pennsylvania Circuit Court:

> It is a principle important to freedom, that in government, the *judicial* should be distinct from, and independent of, the legislative department. To this important principle, the people of the United States, in forming their constitution, have manifested the highest regard. They have placed their *judicial* power, not in congress, but in "*courts.*" They have ordained that the "judges of these courts shall hold their offices during good behavior," and that "during their continuance in office, their salaries shall not be diminished."

Id. at 411 n.(a); *see also id.* at 413 n.(a) (C.C.D.N.C.). *See generally supra* notes 34, 43-45, 55-58, 64, 86, 117, 122-24, 138-48, 171-76 and accompanying text (describing the core Anglo-American principle that the rule of law depends upon the insulation of the judiciary from the political branches, especially the legislature).

208 2 U.S. (2 Dall.) at 410 n.(a) (C.C.D.N.Y.); *accord id.* at 412-13 n.(a) (C.C.D.N.C.).

> cally inconsistent with the independence of that judicial power which is vested in the courts; and consequently, with that important principle [*i.e.*, separation of powers] which is so strictly observed by the constitution . . . .[209]

Indeed, the finality of judicial orders was a cornerstone of both American and English constitutionalism.[210] Because the Act conflicted with the Constitution—"the supreme law," the Justices had the "painful" duty of invalidating the statute.[211]

Although two circuits declined to enforce the Act in their capacity as "judges," they decided to do so individually as "commissioners."[212] However, the Pennsylvania Circuit Court refused to consider the application of Hayburn, a veteran. The Supreme Court granted

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209 *Id.* at 411 n.(a) (C.C.D.Pa.). The North Carolina Circuit Court stated:

> [The Act does not confer judicial power] inasmuch as the decision of the court is not made final, but may be at least suspended in its operation, by the secretary at war . . . [which] subjects the decision of the court to a mode of revision, which we consider to be unwarranted by the constitution; . . . . [N]o decision of any court of the United States can, under any circumstances . . . agreeable to the constitution, be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments.

Id. at 413 n.(a) (C.C.D.N.C.); *see also id.* at 410 n.(a) (C.C.D.N.Y.).

The Pennsylvania Circuit Court apparently believed that the statute assigned duties that were executive in nature—a constitutional violation distinct from the political branches' reservation of power to revise court orders. *See id.* at 411 n.(a); *see also* Wheeler, *supra* note 113, at 137-38 (arguing that congressional authorization for judges to fix any pension rate they deemed "just" required the exercise of "political" administrative discretion rather than "judicial" determination of a rate by applying specific statutory standards). By contrast, the North Carolina Circuit declined to reach that question. *See* 2 U.S. (2 Dall.) at 413 n.(a).

210 *See supra* notes 45, 99, 116, 146-48, 176 and accompanying text.

Moreover, where the "court" exercising "judicial" power consisted of legislators, its orders were also final and could not be reviewed by judges or executive officials. For example, in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), the Court upheld the Connecticut legislature's exercise of its longstanding power to set aside a judgment of its state court and grant a new trial. The Justices agreed that, if the legislature's action was characterized as "judicial," its decision had to be final. *See id.* at 395 (Paterson, J.); *id.* at 400 (Cushing, J.). Justice Iredell compared the legislature's power to superintend its courts to the House of Lords' powers of appellate review and impeachment, and he suggested that the exercise of such authority was "judicial" rather than "legislative" and thus entitled to finality. *Id.* at 398 (Iredell, J.); *see also supra* notes 52-53 (discussing finality of Lords' judicial orders); *supra* notes 166-67 (describing Federalists' recoguition that the Senate's exercise of judicial power over impeachments could not be reviewed by federal courts).

211 *See* 2 U.S. (2 Dall.) at 411 n.(a) (C.C.D.Pa.); *id.* at 412 n.(a) ("To be obliged to act contrary either to the obvious directions of congress, or to a constitutional principle, in our judgment equally obvious, excited feelings in us, we hope never to experience again."); *accord id.* at 412 n.(a) (C.C.D.N.C.).

212 *Id.* at 410 n.(a) (C.C.D.N.Y.); *id.* at 414 n.(a) (C.C.D.N.C.). *See* Marcus, *supra* note 192, at 272-73 (citing these statements as evidence of the early distinction between the Court as an institution and the Justices acting as individuals in performing nonjudicial tasks).

Attorney General Randolph standing to assert Hayburn's rights[213] and considered the merits,[214] but never issued a decision because a statutory revision mooted the case.[215]

Hayburn's Case uniquely illuminates Federalist thought. Riding circuit, every Justice agreed that the Constitution's scheme of separated powers requires judicial review and bars political branch revision of judicial orders. Moreover, some Justices believed that equity could occasionally justify the issuance of opinions "extra-judicially."[216] Finally, the Court granted standing to a party (the Attorney General) who sought to vindicate public rights, not his own personal interests.

Unfortunately, the modern Court has inverted *Hayburn's Case* to stand for the proposition that judicial review thwarts separation of powers and therefore should be strictly limited through the justiciability doctrines—specifically, by restricting standing to plaintiffs who can show an individualized injury to a private law interest.[217]

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213 Initially, Randolph sought a writ of mandamus ordering the Pennsylvania court to act. *See Hayburn's Case*, 2 U.S. (2 Dall.) at 409. The Supreme Court split 3-3 on the issue of whether Randolph could "proceed *ex officio*" (*i.e.*, solely in his capacity as Attorney General) and denied his petition. *Id.* at 408-09. *See* Maeva Marcus & Robert Teir, Hayburn's Case: *A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 534-39 (demonstrating that the Court decided only this narrow procedural question). Randolph then changed his approach and claimed that he was proceeding on behalf of Hayburn. *See* 2 U.S. (2 Dall.) at 409.

214 2 U.S. (2 Dall.) at 409. If the Court had concluded that the matter were nonjusticiable, it would have dismissed the case for want of jurisdiction, not considered the merits. *See, e.g.*, CURRIE, *supra* note 194, at 8 ("[I]t is by no means clear that the Justices meant to invoke what we now know as the constitutional dimension of the law of standing . . . ."); Marcus & Teir, *supra* note 213, at 539-46.

215 *See Hayburn's Case*, 2 U.S. (2 Dall.) at 409-10 (citing Act of Feb. 28, 1793, ch. 17, § 3, 1 Stat. 324 (removing requirement that federal judges determine pension applications)). The Court later invalidated pension-claim determinations made before February 1793 by judges sitting as commissioners. In 1793, the Court denied Randolph's request for a writ of mandamus to compel the Secretary of War to place on the pension list a veteran whose application had been approved by the judge-commissioners. *See* Susan L. Bloch & Maeva Marcus, *John Marshall's Selective Use of History in* Marbury v. Madison, 1986 WIS. L. REV. 301, 306-07. A similar mandamus request by new Attorney General Bradford was also rejected. *See* United States v. Chandler (U.S. 1794) (unpublished), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 15, at 222-23, 226; *see also* Bloch & Marcus, *supra*, at 307-08, 314-15 (discussing *Chandler*). Finally, the Court held that the Pension Act granted federal judges no authority to act as commissioners. *See* United States v. Yale Todd (U.S. 1794) (unpublished), *reprinted in* United States v. Ferreira, 54 U.S. (13 How.) 40, 52-53 (1851); *see also* Bloch & Marcus, *supra*, at 308-09, 316 (analyzing *Yale Todd*).

Even after the Pension Act litigation, however, federal judges performed duties that entailed the exercise of "judicial" functions outside the context of specific, adversarial "Cases" and "Controversies." Pursuant to congressional requests, federal judges found facts in considering petitions for naturalization, claims of customs violations, and contested elections. *See* Wheeler, *supra* note 113, at 132-36. Such judicial duties have continued to the present. *See infra* note 309.

216 *Hayburn's Case*, 2 U.S. (2 Dall.) at 414 n.(a) (C.C.D.N.C.).

217 *See infra* notes 330-31, 338, 368-74, 381-97, 405-25, 451-65 and accompanying text.

2. *The Correspondence of the Justices and Advisory Opinions*

England and many states permitted courts to render "advisory opinions" on legal questions submitted by the political branches outside the litigation context. Consistent with this practice,[218] Secretary of State Jefferson sought answers to "abstract questions" about international law, treaties, and statutes related to the war between England and France.[219] Jefferson acknowledged, however, a possible preliminary issue about the "propriety" of the Court giving "*advice on these questions.*"[220] In a letter, the Justices responded that his request implicated

> the lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments.[221]

Contrary to conventional wisdom, this letter did not state that Article III prohibits advisory opinions.[222] Rather, the Justices said that issuing opinions "extra-judicially"[223] would be improper under the Constitu-

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218 *See supra* notes 78, 113, 174 and accompanying text (describing advisory opinion practice). Confirming Washington's understanding that this practice would continue, Jay had given him private advice on several occasions before 1793. *See* Wheeler, *supra* note 113, at 145-48; *see also supra* note 216 (noting tentative approval of advisory opinions by some Justices in *Hayburn's Case*).

219 *See* Letter from Thomas Jefferson to Chief Justice Jay and Associate Justices (July 18, 1793), *reprinted in* 3 JAY PAPERS, *supra* note 20, at 486-87.

220 3 *id.* at 487.

221 Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), *reprinted in* 3 JAY PAPERS, *supra* note 20, at 488-89.

222 The Court and most scholars have failed to recognize that Article III says nothing about advisory opinions, and that its general reference to "judicial power" does not necessarily foreclose them because at the time of the framing judges often issued such opinions. *See supra* notes 78, 113, 174. Nonetheless, the lack of specific constitutional authorization to render advisory opinions militates against doing so, for federal courts are created by a written Constitution that enumerates their powers, and therefore they should be reluctant to imply further powers. *Cf.* Calabresi & Prakash, *supra* note 29, at 632 (Absent an express constitutional grant to render advisory opinions, the Chief Justice had no inherent "judicial power" to do so.).

223 I previously construed this letter narrowly to mean that the Court must render its decisions only in a "judicial" proceeding on its regular docket, not "extra-judicially" in the form of a private opinion letter to the President. Pushaw, *supra* note 36, at 516-17. Upon further reflection, I have concluded that the latter point conflicts with Jefferson's language inquiring "whether the *public* may, with propriety, be availed of [the Court's] advice on these questions." *See* 3 JAY PAPERS, *supra* note 20, at 487 (emphasis added); *see also* Wheeler, *supra* note 113, at 146-56 (arguing that the Justices, who had given the President confidential private advice before, feared that rendering advice publicly would threaten the independent exercise of judicial power if the same questions arose later in litigation).

tion's scheme of "separation" and "checks," which severs the executive and judiciary. Most importantly, Article II "expressly" and "purposely" empowers the President to require written opinions from his *executive* subordinates[224] (and, by implication, not from federal judges). Only after the President acts on this advice and executes the law would the Court be available "in the last resort."[225]

As an interpretation of the Constitution's text, the Justices' conclusion is reasonable but not inescapable.[226] However, the Constitution's drafting history (which could not be cited because it had been kept secret)[227] overwhelmingly supports this outcome. The delegates rejected proposals to require the Justices to render advisory opinions, give the President written opinions, and join with executive officials in reviewing statutes.[228] These measures failed for two reasons. First, the ideal of an independent, apolitical judiciary would be undercut if judges expressed an opinion about a law that might later come before them in a lawsuit.[229] Second, the autonomy and unity of the executive branch demanded that the President execute the law without consulting judges.[230] Those same separation-of-powers concerns explain the Justices' prudential refusal to issue opinions outside the adjudicatory context.[231]

Nonetheless, I remain convinced that the Justices may have issued an opinion if the executive branch had initiated a lawsuit and given England and France (or other interested parties) notice to argue the issues raised. *See* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1373 n.65 (1973) [hereinafter Monaghan, *Adjudication*].

224 U.S. CONST. art. II, § 2, cl. 1.

225 CURRIE, *supra* note 194, at 13.

226 This textual vagueness explains the Court's tentative language—that "considerations" (not rules) "afford[ed] strong arguments" (not legal imperatives) against the "propriety" (not constitutionality) of issuing advisory opinions. 3 JAY PAPERS, *supra* note 20, at 488. *See* CURRIE, *supra* note 194, at 13-14; Wheeler, *supra* note 113, at 154. Thus, the Justices' letter reflects prudential considerations guided by general separation-of-powers notions. Nonetheless, Joseph Story later concluded that the Justices had established an absolute constitutional bar against any "extrajudicial interpretations of law." 3 STORY, *supra* note 166, § 1771, at 651. Story's view has gained widespread acceptance. *See, e.g.*, Muskrat v. United States, 219 U.S. 346, 354 (1911); Wheeler, *supra* note 113, at 145, 157-58.

227 *See* 1 FARRAND, *supra* note 77, at xi-xii (noting that the Convention debates were secret and that its records were not published until 1819).

228 *See supra* notes 172-74 and accompanying text.

229 *See* Wheeler, *supra* note 113, at 153-56.

230 *See supra* note 173. The letter says nothing about Congress, and Article I has no analogue to Article II's provision for written opinions by department heads. Advisory opinions to the legislature, however, raise the same danger of compromising the Court's impartiality.

231 Professor Wheeler has argued that Jay did not mean to prohibit *all* formal advisory opinions; rather, he would have allowed advice on a specific question that could not later arise in an ordinary lawsuit. *See* Wheeler, *supra* note 113, at 149-56. Furthermore, Wheeler points out that the Justices' correspondence remained unpublished for nearly a century and therefore may not have been widely known, and that some Justices apparently rendered advisory opinions in 1802 and 1822. *See id.* at 145 n.98, 157-58. Nonetheless, after

In this century, however, the Justices' letter has been misinterpreted as establishing an Article III prohibition against rendering a decision in a litigated case because of standing, ripeness, or mootness concerns.[232]

3. *Marbury, Separation of Powers, and Judicial Power Over the Coordinate Branches*

Marbury v. Madison[233] simultaneously reaffirmed and undermined the Federalist approach to separation of powers and justiciability. Consistent with Federalist doctrine, the Court asserted that it could judge the legality of executive and congressional actions in the course of exercising judicial power. Unfortunately, Chief Justice Marshall ignored the very principles he articulated, for most of his pronouncements about the coordinate branches were nakedly political and unnecessary to the resolution of the case.[234] The paradoxes of *Marbury* become evident upon examining the two parts of the opinion—one directed at the executive, the other at Congress.

a. *Judicial Control Over the Executive Branch*

Adams made the last-minute appointment of Marbury to be a justice of the peace, an office created by federal statute. Madison, the

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1793 the Court as an institution never again issued a formal advisory opinion, and none of the five Justices who had signed the letter ever did so in their personal capacities. However, their successors continued to give certain advice individually—especially on matters that directly affected federal courts, such as jurisdictional and procedural rules. *See* Marcus, *supra* note 192, at 273-75; Wheeler, *supra* note 113, at 147.

A related point is that Congress has always authorized federal courts to make rules goveruing their own practices and procedures. *See, e.g.*, Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73. The Marshall Court held that such provisions did not impermissibly delegate legislative power to courts. *See, e.g.*, Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41-50 (1825) (Marshall, C.J.). Although the *Wayman* Court did not fully explain this result, it was probably influenced by longstanding Anglo-American practice. *See supra* note 36. Such procedural rulemaking does not seriously threaten separation-of-powers values, for two reasons. First, in contrast to legislative acts, such rules do not govern general out-of-court conduct. Second, a judge's application of uniform, pre-existing procedural rules is unlike her creation of a substantive legal rule to decide a particular case—the sort of arbitrary judicial tyranny the Framers feared. *See supra* note 140. *See generally* Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733 (1995) (contending that Congress's interference with the federal courts' procedural rulemaking undermines judicial independence).

232 *See infra* notes 332-33 and accompanying text.

233 5 U.S. (1 Cranch) 137 (1803).

234 *See infra* notes 242-50 and accompanying text. For the political background of *Marbury*, see James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219 (1992); Alfange, *Marbury*, *supra* note 142, at 349-72. I do not mean to imply that, before *Marbury*, political considerations never influenced judicial decisions. For example, Federalist judges had vigorously enforced the Alien and Sedition Acts against strong constitutional claims. *See, e.g.*, Engdahl, *supra* note 91, at 297-304. But while those decisions arguably could be justified as embodying appropriate deference to the political branches, *Marbury* could not.

new Secretary of State, refused to deliver Marbury's commission, so Marbury sought mandamus to compel its conveyance.[235]

Initially, the Court distinguished an executive official's performance of a ministerial duty specified by the legislature, which was "judicially examinable," from his exercise of discretionary political power, which was "only politically examinable."[236] The Chief Justice determined that delivery of the commission was a ministerial statutory obligation; hence, the matter was justiciable.[237]

The Court then held that Madison's actions had violated Marbury's right to his commission—a property right, implied from the statute, that had vested at the time of his appointment.[238] Marshall thereby alchemically transformed a public law action into a suit at common law. Under established practice, Marbury (or any citizen) could have requested mandamus to force an executive officer to comply with the law, even if that official's conduct had not affected his individual rights.[239] The Court, however, suggested that (1) a writ seeker had to show invasion of a private law right;[240] and (2) the parties involved had a dispute about property rights—even though Marbury had no real interest in his petty office, and Madison cared so little that he refused to participate in the proceedings.[241]

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235 *Marbury*, 5 U.S. (1 Cranch) at 137-38, 154-55.

236 *Id.* at 158, 162, 164-67, 169-71. The Court insisted that it alone could make the difficult distinction between a "judicial" question of statutory duty and a "political" question involving the exercise of discretion. *Id.* at 165, 167, 170-71. *See* Bloch & Marcus, *supra* note 215, at 336; O'Fallon, *supra* note 234, at 250; *see also infra* notes 266-68 and accompanying text (analyzing *Marbury*'s "political question" doctrine).

237 *See Marbury*, 5 U.S. (1 Cranch) at 167-68. *But see id.* at 172-73 (conceding that the statute nowhere "expressly" specifies that the Secretary of State must deliver the commission).

238 The statute providing for justices of the peace gave those judges a contractual or property right in their offices. *Id.* at 154-55, 162, 164-65. *See, e.g.*, Akhil R. Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 447 (1989) [hereinafter Amar, *Section 13*]; O'Fallon, *supra* note 234, at 232-33, 247. That right vested at the time of appointment—not, as Jefferson contended, on delivery or receipt of the commission. *See* 5 U.S. (1 Cranch) at 155-62, 167-68; *see also* O'Fallon, *supra* note 234, at 246-47.

Arguably, the most important part of *Marbury* was the Court's assertion of broad power to compel the executive branch to comply with statutes (as authoritatively interpreted by the Court), thereby ensuring that the President faithfully executed the laws. 5 U.S. (1 Cranch) at 163-73. *See* Alfange, *Marbury*, *supra* note 142, at 375, 377-79, 384; *see also* Kendall v. United States, 37 U.S. (12 Pet.) 524, 610-14 (1838) (holding that Congress may impose duties on executive officers who are not subject to the President's direction and that Article II's "Take Care" Clause does not give the President discretion to decline to execute legislation). *See generally supra* note 110 (discussing the Take Care Clause).

239 Although the petitioner for a prerogative writ often had been personally affected by the challenged official action, such a direct stake was not required. *See supra* note 33.

240 *Marbury*, 5 U.S. (1 Cranch) at 163 (emphasizing the "right of every individual to claim the protection of the laws whenever he receives an injury"); *id.* at 166, 169-71, 172-73.

241 *See* Pushaw, *supra* note 36, at 500-01.

The Chief Justice's odd characterization of rights and remedies did, however, enable him to chastise the executive branch gratuitously for violating individual rights.[242] Because the Court eventually held that it lacked jurisdiction to issue mandamus,[243] it should not have declared that mandamus ordinarily would have been a proper remedy or discussed what it would have done if it had possessed jurisdiction.[244]

b. *Judicial Review to Invalidate Acts of Congress*

Marshall's desire to assert the power of judicial review best explains *Marbury*'s holding that Section 13 of the Judiciary Act[245] violated Article III, because his interpretations of both the statutory and constitutional provisions are so unconvincing.[246]

Read most sensibly, Section 13 has two distinct parts: the first grants the Supreme Court original jurisdiction in proceedings involving either ambassadors or states; the second empowers it to issue writs of mandamus in appropriate cases where it already has jurisdiction.[247] Section 13 simply did not apply because the Court had no independent basis of jurisdiction, given that Marbury was neither a foreign minister nor a state.[248] The foregoing interpretation is certainly reasonable, and therefore should have been adopted to avoid constitutional questions.[249] Instead, the Court ruled that Section 13 pur-

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242 *See* Bloch & Marcus, *supra* note 215, at 319 n.70 (Marshall's statements "arguably constituted advisory opinions.").

243 *Marbury*, 5 U.S. (1 Cranch) at 173-80.

244 *See id.* at 168-73. The rule that a court must decide jurisdictional questions before considering the merits was already well-established. *See, e.g.*, Alfange, *Marbury*, *supra* note 142, at 390-91; Amar, *Section 13*, *supra* note 238, at 449-50 n.39; *see also* CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 249-51 (rev. ed. 1926). Indeed, Marshall himself invoked it. *See* United States v. More, 7 U.S. (3 Cranch) 159, 172 (1805). Therefore, Jefferson properly assailed *Marbury* as a "'gratuitous opinion,'" an "'obiter dissertation.'" *See* WARREN, *supra*, at 244-45 (citation omitted). Modern commentators have agreed. *See, e.g.*, CURRIE, *supra* note 194, at 66-67; Alfange, *Marbury*, *supra* note 142, at 369-70, 372, 375, 384, 387-88, 390-91, 410; William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 6-7.

Perhaps anticipating such criticism, Marshall argued that the "delicacy," "novelty," and "difficulty" of the issues in the case "require[d] a complete exposition of the principles on which the opinion to be given by the court is founded." *Marbury*, 5 U.S. (1 Cranch) at 154. But courts are not "required" to explicate the law merely because new or difficult questions arise; rather, such exposition must be necessary to decide the case.

245 Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 73, 80-81.

246 *See* CURRIE, *supra* note 194, at 67-74; Alfange, *Marbury*, *supra* note 142, at 366, 368, 384-85, 393-408; O'Fallon, *supra* note 234, at 252; Van Alstyne, *supra* note 244, at 14-16, 30-33.

247 Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 73, 81. *See* Alfange, *Marbury*, *supra* note 142, at 393-94; Amar, *Section 13*, *supra* note 238, at 456-63.

248 *See, e.g.*, CURRIE, *supra* note 194, at 68; Alfange, *Marbury*, *supra* note 142, at 366; Amar, *Section 13*, *supra* note 238, at 455-56.

249 This canon of statutory construction was already entrenched. *See, e.g.*, Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14 (1800) (Section 11 of the Judiciary Act "can and must

ported to confer original jurisdiction on it to issue writs of mandamus.[250]

The Court then held that the statute, so construed, was unconstitutional. Once again, the Chief Justice accurately set forth Federalist principles, then disregarded them. Marshall's defense of judicial review reiterated the classic Hamiltonian argument: Because judges have the duty to decide "particular cases"[251] by expounding the law, and because the Constitution is fundamental and supreme law, the Court must apply the Constitution instead of a clearly repugnant legislative act—such as a bill of attainder or *ex post facto* law.[252] Conversely, absent such an unambiguous constitutional breach, Congress's will had to be enforced.[253]

Marshall, however, did not carry his burden of demonstrating that Section 13 plainly violated the constitutional provision at issue—Article III, Section 2, Clause 2, which states:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Chief Justice asserted that this langnage had a single obvious meaning: Congress could not add mandamus actions (or anything else) to the Court's original jurisdiction, because such jurisdiction was limited to the two categories listed (*i.e.*, foreign minister and state-party proceedings).[254] Although that interpretation is logical, others

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receive a construction consistent with the constitution."); THE FEDERALIST No. 78, at 525-26 (Hamilton); CURRIE, *supra* note 194, at 55; Alfange, *Marbury*, *supra* note 142, at 395-97; Amar, *Section 13*, *supra* note 238, at 449-50 n.39.

250 *Marbury*, 5 U.S. (1 Cranch) at 173.

251 *Id.* at 178. In his passage on judicial review, Marshall repeatedly used phrases such as "particular case," "that case," or "the case." *See id.* at 177-79. This repetition underscores that judicial review is legitimate only when necessary to decide a specific case. *Cf.* Engdahl, *supra* note 91, at 325-26 (construing this language as suggesting that the judiciary's determination of a constitutional question binds only the parties in the case decided).

252 *Marbury*, 5 U.S. (1 Cranch) at 176-80; *see also id.* at 176 (The principles of judicial review are "long and well-establisbed."). Marshall's argument and his illustrative examples tracked THE FEDERALIST No. 78, at 525-26 (Hamilton). *See supra* notes 141-49 and accompanying text (analyzing Hamilton's reasoning); *supra* note 150 (examining similar arguments of other Federalists); *supra* note 194 (setting forth similar opinions by early Justices). Others have noted that the Chief Justice's justification for judicial review was not original. *See, e.g.*, ROBERT L. CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW 79 (1989) (*Marbury* "was based on sound constitutional doctrine and existing legal precedent."); CURRIE, *supra* note 194, at 69-72; O'Fallon, *supra* note 234, at 227 n.30, 235-36, 249, 256, 258-59.

253 *Marbury*, 5 U.S. (1 Cranch) at 176-79; *see also supra* notes 154-57 and accompanying text (describing Hamilton's limitation of judicial review to clear constitutional violations); *supra* note 194 (citing pre-*Marbury* opinions to similar effect).

254 *Marbury*, 5 U.S. (1 Cranch) at 174-75.

also seem plausible: for example, that Congress must include these two matters in the Court's original docket as a minimum but can augment this jurisdiction.[255] Thus, Marshall's "plain meaning" argument did not suffice.[256] Rather, he had the duty to persuasively justify striking down the statute based on further analysis of the Constitution's text, structure, history, and precedent.[257] In failing to do so, Marshall "transformed judicial review from the enforcement of explicit fundamental law against *conceded* violation into the open-ended exposition of supreme written law."[258] Correspondingly, the Court abandoned the Federalist postulate that a law could be declared unconstitutional only when necessary to decide a case.

Overall, *Marbury* captured the Federalist doctrine that the judiciary could examine the actions of the coordinate branches, but ignored key limits on such review. Most importantly, the Court should not have resolved any legal questions involving government officials when it lacked jurisdiction. Furthermore, the Court should have construed Section 13 to avoid the constitutional issue, or at least upheld the statute as based upon a reasonable interpretation of Article III. Oblivious to what Marshall actually did, the modern Court has cited

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255 *See* Amar, *Section 13, supra* note 238, at 464. Another possible meaning is that Article III merely establishes a starting point from which Congress can depart by either adding or deleting cases. *Id. But see id.* at 463-78 (arguing that these alternative constructions are incorrect).

256 *See id.* at 464, 469 (acknowledging that the mere words of Section 13 do not clearly convey the meaning Marshall attributes to them). Further doubt about the Chief Justice's reading arises because he ignored numerous cases in which the Court had considered petitions for writs under Section 13 without suggesting any constitutional problem. *See supra* note 197. Marshall was aware of these decisions, for Marbury's counsel had cited them. *See Marbury*, 5 U.S. (1 Cranch) at 148-49. *But see* Amar, *Section 13, supra* note 238, at 461-62 (distinguishing all but one of these cases as arguably involving the Court's appellate (not original) jurisdiction and noting that the remaining decision did not specify jurisdictional grounds for dismissal).

Moreover, Marshall distorted precedent. To support the key holding in the first part of his opinion that mandamus could lie against the Secretary of State without infringing executive prerogatives, the Chief Justice described and relied on an unnamed case. *See Marbury*, 5 U.S. (1 Cranch) at 171-72. This "case" actually was a composite of three unreported decisions. *See* Bloch & Marcus, *supra* note 215, at 311-18 (discussing cases cited *supra* note 215). Marshall then ignored that same trio of cases (and several others) in the second part of his opinion because they undercut his argument that the Court could not constitutionally issue mandamus under Section 13. *See id.* at 303, 310-11, 318, 322-23, 326-33, 336-37.

257 Such a detailed examination of Article III's language, structure, and surrounding history has recently been provided by Professor Amar, who convincingly demonstrates that Congress cannot enlarge the Court's original jurisdiction. *See* Amar, *Section 13, supra* note 238, at 459-78. Amar's impressive evidence, however, is completely absent from the *Marbury* opinion. Thus, the Court did not justify its invalidation of a federal statute.

258 *See* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 123 (1990) (emphasis added).

Marbury as exemplifying the judicial restraint embodied in the justiciability doctrines.[259]

4. *The Development of the Political Question Doctrine*

Federalist separation-of-powers theory recognized certain exceptions to judicial review. For instance, Hamilton argned that federal courts could examine the constitutionality of statutes based on the "natural presumption" that Congress could not be the final judge of its own powers, but acknowledged that "particular provisions in the constitution" might rebut this presumption.[260] These few areas of total legislative and executive discretion gradually became known as "political questions."

The Jay and Ellsworth Courts often simply reviewed majoritarian branch actions,[261] thereby concluding *sub silentio* that they did not present political questions. For example, in *Hollingsworth v. Virginia*,[262] the Court rejected the claim that the adoption of the Eleventh Amendment violated the Constitution because it had not been submitted to the President for approval under Article I, Section 7. The Court held that the veto power applied only to ordinary legislation, not to constitutional amendments.[263] The decision nowhere intimated that the amendment process raised political issues outside the judiciary's competence.[264]

The Marshall Court made more explicit that some questions were exempt from the otherwise broad reach of judicial power. Most importantly, in *Marbury* the Court asserted authority to examine whether executive officers had violated specific statutory duties,[265] but recognized that "questions in their nature political, or which are by the constitution and laws, submitted to the executive, can never be made in this court."[266] Examples of the latter included nominations of execu-

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259 *See infra* notes 420-25, 428 and accompanying text.

260 THE FEDERALIST No. 78, at 524-25, discussed *supra* note 148 and accompanying text.

261 *See supra* notes 193-94 and accompanying text. The Court declined to decide only matters affecting international relations. *See, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (allowing the elected branches to determine whether a foreign nation had broken a treaty and whether a hostile act amounted to war).

262 3 U.S. (3 Dall.) 378 (1798).

263 *Id.* at 381 n(a).

264 *See* CURRIE, *supra* note 194, at 22.

265 Marbury claimed that these statutory violations had deprived him of a *property* right, not that his *constitutional* rights had been infringed. *See Marbury*, 5 U.S. (1 Cranch) at 154-55, 162-66, discussed *supra* notes 238-42 and accompanying text; *see also* Alfange, *Marbury*, *supra* note 142, at 407 n.349 (noting that Marshall's discussion of political questions in the context of the executive's statutory duties was unrelated to his later discussion of whether the congressional act violated the Constitution).

266 *Marbury*, 5 U.S. (1 Cranch) at 170. Marshall's use of the disjunctive "or" might suggest that a question could be nonjusticiable for two separate reasons. First, an issue could be inherently "political." *See* PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS

tive officers and foreign affairs decisions that did not violate individual rights.[267] Marshall indicated that in such matters the President's exercise of discretion is necessarily "legal" and thus cannot violate anyone's "rights"—not that certain infringements of legal rights have no remedy.[268]

Following similar logic in *Martin v. Mott*,[269] the Court upheld a statute authorizing the President alone to determine whether exigencies warranted calling forth the militia to repel an invasion.[270] The Court ruled that the President's judgment was subject only to political scrutiny because a judicial proceeding would interfere with his Article II powers as Commander-in-Chief and might jeopardize national security interests.[271] Finally, *Gibbons v. Ogden*[272] stressed that judicial review of Congress's exercise of its Commerce Clause power was limited to assuring that it did not try to regulate purely internal state economic affairs:[273]

> [P]ower over commerce . . . is vested in congress . . . absolutely . . . . The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.[274]

AND THE LAW OF FEDERAL-STATE RELATIONS 12 (3d ed. 1994) (arguing that this language might justify the Court's declining to exercise judicial review based simply on its determination that a matter is "political"). Second, a question might be "submitted to the executive" by law. 5 U.S. (1 Cranch) at 170; *see also id.* at 164-67, 170-71 (repeatedly stating that the Constitution commits many political decisions to the President's sole discretion).

Any such distinction should not be pushed too far, however. Marshall's initial reference to "[q]uestions in their nature political" might have been intended either (1) to cover issues that the Constitution does not expressly commit to the President but that nonetheless implicitly fall within his purview (*e.g.*, the power to withdraw recognition from a foreigu government); or (2) to indicate that certain political questions were submitted not to the President but to Congress.

267 *Marbury*, 5 U.S. (1 Cranch) at 166-67. If a government official did invade a person's vested legal right, the Court could remedy that injury despite political repercussions. *Id.* at 154-73; *see also* Blumoff, *supra* note 145, at 259-62, 266-74, 283-92, 304-05, 326-27 (demonstrating that the Court, during the first century of its existence, always decided cases implicating international relations when individual rights were at stake, although it often applied as the rule of decision the legal determination previously made by the political branches).

268 *See* CURRIE, *supra* note 194, at 67 n.19.

269 25 U.S. (12 Wheat.) 19 (1827).

270 *Id.* at 28-29 (upholding Congress's power to enact this statute under U.S. CONST. art. I, § 8, cl. 15).

271 *Id.* at 29-32.

272 22 U.S. (9 Wheat.) 1 (1824).

273 *Id.* at 194-96 (citing U.S. CONST., art. I, § 8, cl. 3).

274 *Id.* at 197; *see also* United States v. Palmer, 16 U.S. (3 Wheat.) 610, 633 (1818) (holding that Congress's treaty interpretation and its decision about the rights of foreign-

In short, the early Court followed Federalist separation-of-powers principles by holding that the presumption favoring judicial review could be rebutted only by a showing that the Constitution committed a question entirely to the political branches—for example, the President's decisions about nominations, foreign affairs, and the militia, and Congress's power to declare war and regulate interstate commerce. This Federalist understanding is the key to unlocking the mysteries of the current political question doctrine.[275]

D. The Federalist Approach To Separation of Powers, Judicial Review, and Justiciability: A Summary

The early Court implemented Federalist theory about the judiciary's proper role in the constitutional system. The basic premise was that federal courts had a duty to exercise all jurisdiction constitutionally granted by Congress. Thus, standing was a straightforward matter of ascertaining whether a statute, the Constitution, or the common law gave the particular claimant a right to sue. This approach promoted separation of powers in two ways. First, it deferred to the legislature's policy judgment as to which person(s) could most effectively vindicate federal law—even if the designated plaintiffs did not have a personal stake in the outcome.[276] Second, it ensured that laws enacted by Congress and executed by the President would ultimately be interpreted by federal courts.

Consistent with the latter coextensiveness principle, its rule-of-law rationale, and the overriding separation-of-powers goal of preventing tyranny, the Court asserted judicial power to determine the lawfulness of political branch conduct. Most importantly, when necessary to decide a case, courts could invalidate government actions that clearly violated the Constitution.[277] Judicial review could be declined only if the Constitution itself gave Congress or the President final decision-making authority because of the paramount need for efficiency (in foreign affairs, for example). Furthermore, separation of powers prohibited the political branches from obtaining judicial opinions under

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ers at war raised questions "political rather than legal in character"); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801) (affirming Congress's sole power to declare war).

275 *See infra* part II.B.4.

276 For example, Congress authorized enforcement of federal law through prerogative writs that were available to any citizen. *See supra* note 197; *see also supra* notes 213-14 and accompanying text.

277 By voiding a law that was not plainly unconstitutional, *Marbury* indicated that the Court might begin to exercise judicial review against the coordinate branches more frequently. However, the Court refrained from doing so for over half a century. *See infra* notes 280-81 and accompanying text.

The Justices occasionally gave opinions on federal questions even when this was not essential to decide a case. *See* discussion of *Hayburn's Case* and *Marbury*, *supra* notes 216, 234, 244, 258 and accompanying text.

circumstances that would threaten the judiciary's independence. Most significantly, the majoritarian departments could not (1) review a court's final order, or (2) require a judge to issue an advisory opinion.

E. Judicial Adherence to the Federalist Paradigm Throughout the Nineteenth Century

The Federalist approach to separation of powers, judicial review, and justiciability proved durable.[278] The Civil War transformed federalism, as the People reallocated power from states to the national government. The federal government's enlarged authority made separation of powers more critical, with the locus of power shifting from the Presidency during the War to Congress during Reconstruction.[279] During this era the Supreme Court, which had unwisely chosen *Dred Scott*[280] as its first exercise of coordinate-branch judicial review since *Marbury*, resumed its deference to the actions of the political departments.[281]

In the last quarter of the nineteenth century, however, judicial power began to expand. The 1875 statute granting general federal question jurisdiction greatly increased federal court dockets.[282] Furthermore, the Court gradually loosened traditional restraints on judi-

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278 The following analysis oversimplifies enormously complicated events. For an excellent discussion of the Court's jurisprudence from the Taney Court to the late 19th century, see CURRIE, *supra* note 194, at 201-455.

279 *See* ACKERMAN, *supra* note 13, at 45-46, 48-49; Amar, *Sovereignty*, *supra* note 13, at 1450-66. Although the national government asserted its new authority to guarantee the labor, property, and contract rights of all citizens, it remained a government of enumerated powers. *See, e.g.*, The Trade-Mark Cases, 100 U.S. 82 (1879) (striking down federal statutes regulating trademarks, copyrights, and patents as exceeding Congress's Article I powers). Moreover, its authority over economic and social regulation was still limited. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3 (1883) (invalidating a congressional act that barred racial discrimination in private inns, theatres, and railroads because the Fourteenth Amendment was limited to state action); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); *see also* ACKERMAN, *supra* note 13, at 81-103.

280 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (holding that no descendant of slaves could be a citizen of the United States or a state for jurisdictional purposes and that Congress's "Missouri Compromise" was unconstitutional). *See* CURRIE, *supra* note 194, at 264 (characterizing *Dred Scott* as "bad law," "bad policy," and "bad judicial politics").

281 *See, e.g.*, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869) (upholding a federal statute that stripped the Court of jurisdiction to review the *habeas corpus* petition of an imprisoned editor who had challenged the constitutionality of the Reconstruction Acts).

Although the Court generally kept a low profile during Reconstruction, the expansion of the national government's power inexorably increased the scope of federal court jurisdiction. *See* William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1876*, 13 AM. J. LEGAL HIST. 333 (1969).

282 *See* Judiciary Act of March 3, 1875, ch. 137, §§ 1-2, 18 Stat. 470-73 (codified as amended at 28 U.S.C. § 1331 (1982)). *See generally* HART & WECHSLER, *supra* note 173, at 37-38 (describing the explosion of the federal court caseload in the late 19th century); Winter, *supra* note 33, at 1452-53 (same).

cial review, as reflected in its growing willingness to strike down progressive social and economic legislation on substantive due process grounds.[283]

Although the Court created new jurisdictional devices to limit the federal caseload,[284] it left the justiciability doctrines largely intact. First, the Court reaffirmed that the political branches could not revise judicial decisions.[285] Second, advisory opinions ceased. Third, standing remained primarily a question of substantive law—whether the plaintiff asserted a right for which a statute or the Constitution provided a remedy.[286] Fourth, the Court exercised discretion to dismiss moot cases.[287] Finally, the political question doctrine was reaffirmed in *Luther v. Borden*,[288] which held that the judiciary must defer to Congress's prior determination that a state government has satisfied Article IV's guarantee of "a Republican Form of Government."[289] In sum,

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283 This approach took root during Chief Justice Fuller's tenure (1888-1910), most famously in Lochner v. New York, 198 U.S. 45 (1905). *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, at 3-83 (1990) [hereinafter CURRIE, SECOND]. This jurisprudence continued through the mid-1930s. *See infra* notes 295-97 and accompanying text. Some decried this invalidation of laws that did not comport with the Justices' views of the Constitution's abstract meaning, and they urged the Court to return to the practice of upholding any rational political branch action that was not clearly prohibited by the Constitution. An early and influential statement of this position was James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

284 *See, e.g.*, Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875) (establishing the "adequate and independent state ground" doctrine).

285 *See, e.g.*, Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865) (no opinion), 117 U.S. 697, 703 app. (1885) (reprinting opinion of Taney, C.J., citing Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792)).

286 *See generally* Winter, *supra* note 33, at 1378, 1418-25 (citing cases). A claim could also be grounded in the common law or equity.

287 *See, e.g.*, Mills v. Green, 159 U.S. 651 (1895). *Cf. Hayburn's Case*, 2 U.S. (2 Dall.) at 409-10 (holding that a statutory revision mooted the case).

288 48 U.S. (7 How.) 1 (1849).

289 Borden was a sheriff of the Rhode Island government that had existed from colonial times under a charter. The state declared martial law in the early 1840s to thwart a new government that had been formed pursuant to a convention. Borden broke into the home of Luther, an official of the new regime. Luther sued for trespass and alleged that Borden had lacked lawful authority to act because the charter government violated Article IV, Section 4 of the Constitution, which guarantees every state "a Republican Form of Government." *Luther*, 48 U.S. (7 How.) at 34-38.

The Court held that the Guarantee Clause did not authorize it to decide independently which of the competing state regimes was legitimate, but rather required acquiescence to Congress's determination that the charter government was lawful and "republican." *Id.* at 42. Furthermore, the Justices emphasized that Congress had granted the President exclusive discretion to decide when the militia was needed to quell an insurrection and that, in exercising this power, he had also recognized the charter government. *Id.* at 43-45. The Court yielded to the President's judgment, comparing it to his judicially unreviewable recognition of a foreign government. *Id.* at 44. Finally, the Court found Borden's break-in justified even though he had acted under military orders, because Rhode Island (like any state) had power to declare temporary martial law to meet threats to its very existence. *Id.* at 45-46. The Court deemed it unnecessary "to inquire to what

the Court did not appreciably alter the Federalist approach to justiciability and separation of powers for more than a century.

II

JUSTICIABILITY AND SEPARATION OF POWERS IN THE TWENTIETH CENTURY: A NEO-FEDERALIST CRITIQUE

During this century, the Court has purported to adhere to the Framers' conception of justiciability and separation of powers but has gradually eviscerated it. The result is a patchwork of justiciability doctrines that are unsound in theory and unworkable in practice.

This Part traces the disintegration of the Federalist approach and recommends its reintegration. I will begin by considering the justiciability doctrines as a whole,[290] identifying their common theoretical and historical rationales and setting forth a general Neo-Federalist critique. After surveying the justiciability "forest," I will examine its "trees"—standing, mootness, ripeness, and political questions—and suggest ways that each doctrine could be improved by reintroducing Federalist ideas.

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extent, nor under what circumstances, that power may be exercised by a State" before a Guarantee Clause violation would occur. *Id.* at 45.

Overall, *Luther* acknowledged the unique—but not exclusive—role of the President and Congress in implementing the constitutional guarantee of a republican government. Only recently, however, has the Court rediscovered that (1) *Luther* "limited [its] holding" of nonjusticiability to the situation where the political branches already had determined which of two contending state governments was the established one; and (2) the Court addressed the merits of several Guarantee Clause claims for over half a century after *Luther*. *See* New York v. United States, 505 U.S. 144, 184-85 (1992) (citing cases). The Court conceded that it had long misinterpreted *Luther* as creating an absolute political question bar on all Guarantee Clause suits. *Id.* at 184-85 (citing cases from 1912 through 1980). It mentioned many scholars who had shown the error of that approach. *Id.* at 185, citing, *inter alia*, WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION (1972); Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988). Although the Court did not resolve the issue of which Guarantee Clause claims were justiciable, it indicated a willinguess to entertain such matters. 505 U.S. at 184. *See generally infra* note 575 (setting forth a Neo-Federalist view of this provision).

290 Others have suggested a similar approach. *See, e.g.*, Lee A. Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139 (1977) [hereinafter Albert, *Justiciability*] (arguing that all the justiciability doctrines are not procedural devices for determining whether to exercise jurisdiction under a particular concept of judicial review, but rather are mechanisms for resolving substantive legal questions about whether a plaintiff has a cause of action); Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227 (1990) (recommending that the standing, ripeness, mootness, and political question doctrines be revised to reflect the Court's role as protector of constitutional values); Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677 (1990) (contending that the individual justiciability doctrines should be replaced by a unified approach that focuses on four policy questions: whether the plaintiff is legally entitled to relief; whether a judicial ruling will have some practical effect; whether a litigant should be permitted to raise the claims of third parties; and whether the complaint is based on a constitutional provision that the judiciary should enforce).

A. The Modern Approach to Justiciability and Separation of Powers: An Overview

The modern Court has treated all justiciability doctrines as "constitutional" in two related senses. The first is textual: Article III's language extending "judicial Power" to "Cases" and "Controversies" has been construed as limiting federal courts to the adjudication of live disputes between parties with private interests at stake.[291] The second is structural: Judicial restraint preserves separation of powers by avoiding interference with the democratic political branches, which alone must determine nearly all public law matters.[292]

The Court's conception of justiciability promotes one traditional purpose of separation of powers—governmental efficiency—but sacrifices its countervailing goals: protecting liberty, guaranteeing the rule of law, and checking and balancing power. The Court has neglected the Founders' idea that federal judges represent the People by remedying the unlawful conduct of political branch officials in both private and public judicial actions.

Why did the Court forsake Federalist thought? The answer lies in complex political, social, economic, and legal developments during the first half of the twentieth century.

1. *The New "Wilsonian" Democracy*

By the turn of the century, leading Progressive thinkers (most prominently Woodrow Wilson) had concluded that the Federalist model of a decentralized government based on popular sovereignty, separation of powers, and federalism was inadequate to run a government of increasingly national scope.[293] They urged America to adopt

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291 I have previously challenged this interpretation. *See* Pushaw, *supra* note 36.

292 The Court's rigid formalism in justiciability resembles its approach in one line of its general separation-of-powers cases, which strike down government actions that do not strictly conform to the Constitution's assignment of "legislative power" to Congress, "executive power" to the President, and "judicial power" to federal courts. *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (invalidating a statutory provision conferring Article III judicial power on Article I bankruptcy court judges).

The Court's formalism purports to adhere to the Constitution's text and original meaning, but fails to account for the richness of Federalist political theory. *See* Gwyn, *Indeterminacy*, *supra* note 26, at 265, 267. For example, Bowsher v. Synar, 478 U.S. 714 (1986), held that separation of powers prohibits Congress from conferring "executive" power on the Comptroller General while retaining authority to remove him as if he were part of the "legislative" branch. The Court ignored the larger structural issue—whether Congress could abdicate its core legislative function of making budgetary decisions to the executive. *See* Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343, 348-49 (1989); *see also* Symposium, *Bowsher v. Synar*, 72 CORNELL L. REV. 421 (1987).

293 *See* WOODROW WILSON, CONGRESSIONAL GOVERNMENT (1885) and CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (1907). For a perceptive analysis of Wilson's work, see ACKERMAN, *supra* note 13, at 11, 34-35, 84-86, 222, 257-61; *see also* ELDON J. EISENACH, THE LOST PROMISE OF PROGRESSIVISM (1993) (examining the relationship of Progressive polit-

a British-style "monistic democracy," in which elected officials have plenary lawmaking authority and the legislature carries out the executive's political program, thereby promoting decisive, responsible government.[294] Furthermore, the absence of judicial review in England appealed to Americans who had watched courts undermine Progressive legislation.[295]

When Wilson became President in 1912, he tried to put his theory into practice. Wilson failed, and Harding, Coolidge, and Hoover did not share his vision.[296] Moreover, most social and economic legislation that did emerge was invalidated on substantive due process grounds by the Taft Court (1921-1930).[297] Although Wilson lost the battle, he won the war. His idea that America requires a centralized government with vast executive power was implemented by Franklin D. Roosevelt and has become entrenched.[298] In a nutshell, Americans have substituted the constitutional democracy of one Wilson (Woodrow) for that of another (James).

2. *The New Deal*

a. *Fundamental Constitutional Changes in the 1930s*

FDR spearheaded passage of economic and social legislation that rested on a very broad reading of Article I and granted the executive immense authority by creating many administrative agencies.[299] The New Deal challenged the fundamental constitutional idea of a limited

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ical thought to constitutional issues). Although Progressivism implicated separation of powers, it focused mainly on recharacterizing federalism by advocating increased national power and deemphasizing localism and individual rights.

Rejection of the Federalists' principles was also justified on the ground that they were driven not by their professed ideals but by economic interests. *See* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913). Beard's thesis held sway for over 50 years.

294 *See* ACKERMAN, *supra* note 13, at 7-8, 222, 252-57. Ackerman contrasts "monistic democracy" with the Framers' "dualist Constitution," which distinguishes two democratic decisionmakers: the People, who engage in transformative constitutional lawmaking at certain critical junctures; and their government, which controls the law during periods of normal politics. *See id.* at 6-10, 17-23, 31-32.

295 *See supra* note 283 and accompanying text. This reactionary trend continued under Chief Justice White's tenure from 1910-1921. *See* CURRIE, SECOND, *supra* note 283, at 88, 93-115, 126-30.

296 *See, e.g.*, ACKERMAN, *supra* note 13, at 84-86.

297 *See* CURRIE, SECOND, *supra* note 283, at 133-69, 173-81, 199-201.

298 *See, e.g.*, ACKERMAN, *supra* note 13, at 105-08; *see also* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 422-25, 437-46 (1987) [hereinafter Sunstein, *Constitutionalism*] (tracing the incorporation of Progressivism into New Deal philosophy).

299 The trickle of administrative agencies that had begun in 1887 with the Interstate Commerce Commission turned into a flood in the 1930s. *See* Henry J. Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1022-25 (1977).

federal government divided into three branches exercising enumerated powers.[300]

The Court under Chief Justice Hughes (1930-1941) struggled with these changes. After initial deference,[301] the Court in 1935 invalidated the crucial National Industrial Recovery Act[302] on the ground that Congress had impermissibly delegated its Article I "legislative power" to the President by giving him unlimited discretion to make basic law and policy decisions.[303] The 1936 elections gave FDR a mandate. He announced his plan to pack the Court in 1937, and the Justices capitulated.[304] The Court proceeded to uphold New Deal legislation,[305] eviscerate the non-delegation doctrine,[306] and abandon substantive due process.[307]

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300 *See* ACKERMAN, *supra* note 13, at 105-08; Sunstein, *Constitutionalism*, *supra* note 298, at 422-46.

301 *See* CURRIE, SECOND, *supra* note 283, at 208-15 (citing decisions in the early 1930s relaxing limitations on progressive legislation).

302 Act of June 16, 1933, ch. 90, 48 Stat. 195.

303 *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); *see also* CURRIE, SECOND, *supra* note 283, at 216-20, 222-26.

304 *See* CURRIE, SECOND, *supra* note 283, at 235; *see also* ACKERMAN, *supra* note 13, at 47-49 (describing how FDR's election decisively broke the deadlock between the reformist executive and the conservative judiciary, thereby persuading the Court to end its resistance and ratify fundamental constitutional change).

305 *See, e.g.*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (minimum wage law); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (National Labor Relations Act); Helvering v. Davis, 301 U.S. 619 (1937) (Social Security Act); *see also* CURRIE, SECOND, *supra* note 283, at 236-38.

306 Even in its 1935 cases, the Court emphasized that the problem was not delegation *per se*, but rather Congress's abdication of its legislative power. *See, e.g.*, *Panama Refining*, 293 U.S. at 415, 430; *Schechter*, 295 U.S. at 529-37. In theory, the Court still requires Congress to make the basic policy decision and articulate intelligible legal standards before delegating discretion in applying those standards to the executive branch. In practice, however, the Court has given the legislature unlimited latitude, for it has never again struck down a statute as an unconstitutional delegation. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 371-75 (1989).

307 The death knell was United States v. Carolene Prods. Co., 304 U.S. 144 (1938), which announced that economic regulations would be upheld unless they lacked any "rational basis." *Id.* at 152. *See* ACKERMAN, *supra* note 13, at 119-29 (arguing that *Carolene Products* preserved the Founders' commitment to liberty in the post-New Deal world by emphasizing the Court's duty to enforce specific prohibitions of the Bill of Rights instead of general constitutional provisions concerning property and contract rights).

The Court resurrected its practice of upholding political branch action absent a clear constitutional violation. *See* Alfange, *Marbury*, *supra* note 142, at 346 n.86 and accompanying text (noting that, between 1937 and 1955, the Court sustained all but three federal statutes). This deference, however, found its justification not in Federalist theory but in Legal Realism. The Realists redefined adjudication as the process of balancing competing interests and thus urged courts to yield to the judgment of legislatures, which were better suited to weighing conflicting policy goals. *See* J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 134-43 (1988). Correspondingly, the Realists rejected *Marbury*'s formalist model of the judicial function as the deductive application of determinate, pre-existing legal rules to the facts —the methodology used by the Court in its substantive due process jurisprudence. *Id.*

b. *A "New Deal" for Justiciability: From Brandeis's Prudentialism to Frankfurter's Constitutionalism*

In the quarter century before 1937, the Court adapted justiciability concepts to keep dockets manageable in light of the increasing scope of federal law and the appearance of novel forms of action (*e.g.*, declaratory judgments).[308] The primary architect of these modifications was Justice Brandeis, who urged the Court, as a matter of self-governance and in view of its role of superintending the exposition of federal law, to exercise equitable discretion in applying justiciability and similar doctrines to avoid needless decision of constitutional questions.[309]

Brandeis's disciple Felix Frankfurter, who became a Justice in 1939, led a rapidly emerging majority of FDR appointees in fostering the New Deal by minimizing judicial interference with the political departments through the justiciability doctrines.[310] For example, the Court embraced the Brandeisian strategy of invoking justiciability to shield progressive legislation from conservative substantive due pro-

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308 The earliest modern justiciability decision was Muskrat v. United States, 219 U.S. 346 (1911), which involved a statute that reduced the value of earlier congressional allotments of land to Indians, but authorized the affected grantees to sue the United States. The Court invalidated the jurisdictional provision on the ground that Congress was seeking an advisory opinion on the statute's validity, primarily because the United States had no personal interest adverse to that of the Indian plaintiffs. *Id.* at 352-61. The Court's later approval of declaratory judgments, described *infra* notes 490-92 and accompanying text, undercut *Muskrat*. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 281 (1988).

309 The culmination of this theory was Brandeis's famous concurrence in Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341-56 (1936). Brandeis's earlier justiciability opinions include Pennsylvania v. West Virginia, 262 U.S. 553, 605-23 (1923) (Brandeis, J., dissenting) (arguing that plaintiffs had alleged no violation of their legal rights but were merely seeking a general declaration that a state statute was unconstitutional); Fairchild v. Hughes, 258 U.S. 126 (1922) (denying plaintiff standing to challenge the validity of procedures for ratifying the 19th Amendment).

Brandeis did not, however, reflexively contract federal jurisdiction. *See, e.g.*, The Chicago Junction Case, 264 U.S. 258 (1924) (allowing suit by railroad companies seeking to reverse an agency order on the ground that a federal statute conferred on those companies an enforceable legal interest). His gradual acceptance of declaratory judgments reflects his open-mindedness. *See infra* note 492. Furthermore, Brandeis deferred to longstanding precedent that conflicted with the modern idea that Article III courts can act only if presented with an adversarial dispute. *See, e.g.*, Tutun v. United States, 270 U.S. 568 (1926) (upholding traditional federal court jurisdiction over naturalization proceedings, despite their *ex parte* format).

For an excellent discussion of Brandeis's prudential approach to justiciability and his accompanying goal (not always achieved) of shielding progressive legislation from constitutional attacks in court, see Winter, *supra* note 33, at 1376-78, 1422-24, 1443-48, 1454-57; *see also supra* notes 283, 295-97 (describing substantive due process jurisprudence, which Brandeis opposed).

310 *See* Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 366-71, 375, 395-96 (1995) [hereinafter Stearns, *Historical*].

cess challenges.[311] Furthermore, under Frankfurter's influence, new rules of standing and ripeness were formulated to prevent disruption of administrative agency processes.[312] Finally, the Court deferred to Congress's determination as to which parties—the government, directly affected individuals, and/or citizens generally—should have standing to enforce the novel types of legal rights being created by regulatory statutes.[313]

Unfortunately, neither Frankfurter nor his colleagues acknowledged that they were exercising judicial discretion to fashion a different justiciability scheme to address the radical changes wrought by the New Deal. Instead of following Brandeis's prudential approach, Frankfurter persuaded the Court to characterize justiciability as required by the Constitution's text, history, and political theory. In reality, however, Frankfurter replaced Federalist constitutional principles with those of "monistic democracy."[314] He based justiciability on the sovereignty of elected officials (rather than the People) and on the correspondingly limited (rather than coequal) role of courts in a government of separated powers.[315] The Court's understandable desire to promote the New Deal (*e.g.*, by protecting agency autonomy and barring substantive due process claims) metamorphosed into a hostility toward any constitutional claims, except in rare cases presenting well-developed complaints of individualized, common law harm without significant political overtones.

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311 *See id.* at 368-70, 375, 394-99.

312 *See, e.g.*, Winter, *supra* note 33, at 1374-76, 1449-57 (describing Frankfurter's development of standing doctrine); *infra* notes 490-502 and accompanying text (analyzing the evolution of ripeness to protect the integrity of agency processes).

313 The Court recognized standing if either a statute or the Constitution created a cause of action or if a common law right had been invaded. *See, e.g.*, Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 151-53 (1951) (Frankfurter, J., concurring); Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 137-38 (1939). Most importantly, the Court upheld express congressional grants of standing to any citizen to enforce the public interest protected by legislation, even if the statutory right had no common law analogue. *See, e.g.*, Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14-15 (1942) (Frankfurter, J.). For analysis of the development of this jurisprudence, see JOSEPH VINING, LEGAL IDENTITY 36-37 (1978); Fletcher, *supra* note 308, at 225-27; Stearns, *Historical*, *supra* note 310, at 393-94, 399-400; *see also infra* notes 434-38 and accompanying text (criticizing the Court's recent reversal of its position that judicial separation-of-powers concerns with citizen standing are removed when Congress explicitly authorizes such broad standing).

314 Woodrow Wilson's ideas influenced Frankfurter. *See, e.g.*, Felix Frankfurter & Adrian S. Fisher, *The Business of the Supreme Court at October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 577-78 n.2 (1938) (citing with approval Wilson's letter lauding Brandeis's efforts to restrain the Court's "reactionary" invalidation of the liberal political program); *see also* HELEN S. THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 285-86 (1960).

315 *See, e.g.*, AFL v. American Sash & Door Co., 335 U.S. 538, 555-56 (1949) (Frankfurter, J., concurring) (Because judicial review is "oligarchic" and thwarts "the will of the people," the "power of the non-democratic organ of our Government [must] be exercised with rigorous self-restraint.").

Frankfurter's seminal opinion appeared in *Coleman v. Miller*.[316] *Coleman* involved an appeal by Kansas legislators who had voted against a federal constitutional amendment and claimed that their legislature's ratification of it violated Article V.[317] Seven Justices agreed that the Court should not reach the merits, but for different reasons.[318] The three-member plurality and two dissenters upheld the legislators' standing because they had a "direct" and "adequate" legal interest in maintaining the effectiveness of their votes, regardless of whether they had sustained any private injury.[319] The plurality and four concurring Justices ruled, however, that the validity of the legislature's ratification of the amendment was a "political question" within Congress's sole authority.[320] This holding conflicted with Article V's text[321] and with precedent both recent[322] and venerable.[323]

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316 307 U.S. 433 (1939).

317 Specifically, they alleged that the amendment had not been ratified within a reasonable time after its proposal in 1924, and had lost its vitality because their legislature had rejected it in 1925. *Id.* at 435-36.

318 Chief Justice Hughes wrote a plurality opinion, joined by two others, concluding that the legislators had standing but that their claims should be dismissed on political question grounds. *Id.* at 434-56. Four Justices joined two separate concurring opinions which agreed with the plurality that the case raised political questions, but disagreed that the plaintiffs had standing. *See id.* at 456-60 (Black, J., concurring); *id.* at 460-70 (Frankfurter, J., concurring). Two dissenters argued that the legislators had standing and that they did not present a political question. *Id.* at 470-74 (Butler, J., dissenting).

319 *See id.* at 438, 445-46.

320 *See id.* at 450-55 (Hughes, C.J.); *id.* at 456-60 (Black, J., concurring) (disavowing any implication in the plurality opinion that courts might ever have authority to review Congress's exercise of its Article V power over the amendment process).

321 Article V provides that Congress "shall propose Amendments" on a two-thirds vote or "shall call a Convention for proposing Amendments" on application of two-thirds of the states, with the amendments becoming part of the Constitution if ratified by three-fourths of the states or their Conventions. Article V nowhere precludes judicial review of the amendment process, including the validity of ratification. *See* Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983) (contending that judicial abstention from the amendment process is not based on Article V's text, history, or precedent and subverts the certainty that is essential for legitimate constitutional change).

322 *Coleman*, 307 U.S. at 471-74 (Butler, J., dissenting) (citing Dillon v. Gloss, 256 U.S. 368 (1921), which held that Article V impliedly required ratification of amendments within a "reasonable time" after their proposal, and that Congress's seven-year limit for ratifying the 18th Amendment was reasonable).

323 Curiously, the dissent did not mention Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) (deciding questions about the ratification of the Eleventh Amendment, which had overturned Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)). *See supra* notes 262-64 and accompanying text (discussing *Hollingsworth*); *see also* Dellinger, *supra* note 321, at 403-17 (demonstrating the long history of judicial review of the amendment process).

A rule-of-law objection arises concerning judicial scrutiny of those few amendments designed to overcome the Court's constitutional decisions. *See* Dellinger, *supra* note 321, at 414 (acknowledging this argument, but noting that only four amendments have fallen into this category). Two considerations blunt the force of this point. First, from a historical perspective, the Federalist Justices who decided *Hollingsworth* did not regard this potential conflict of interest as disabling. Moreover, *Hollingsworth* and other cases show that the Court can render impartial opinions about the legality of amendments—even those whose

Furthermore, the concurring Justices, in an opinion written by Justice Frankfurter, concluded that the legislators lacked standing because they had a mere "political" interest in voting procedures shared by all citizens, rather than a "specialized interest of their own to vindicate."[324] Instead of forthrightly admitting that he was dismantling the traditional structure of standing and political questions, however, Frankfurter asserted that his position was compelled by Article III's text and history:

> In endowing this Court with "judicial Power" the Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges. The Constitution further explicitly indicated the limited area within which judicial action was to move—however far-reaching the consequences of action within that area—by extending "judicial Power" only to "Cases" and "Controversies." Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted "Cases" or "Controversies." It was not for courts to meddle with matters that required no subtlety to be identified as political issues. And even as to the kinds of questions which were the staple of judicial business, it was not for courts to pass upon them as abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law.[325]

Frankfurter relied on *Hayburn's Case* for the proposition that "[t]he scope and consequences of our doctrine of judicial review over executive and legislative action should make us observe fastidiously the bounds of the litigious process within which we are confined."[326] He

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purpose is to overturn its own rulings. *See id.* at 415-17. Second, Congress also has a bias in judging amendments, whether proposed by Congress (in which case it would be predisposed to uphold their validity) or by a national convention where the federal legislature has been unwilling to act (in which case Congress would be inclined to find invalidity). *See id.* at 398-99, 416; *see also* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849, 854 (1994) [hereinafter Chemerinsky, *Guarantee Clause*]. *See generally infra* notes 569-71 and accompanying text (arguing that the Court should reverse *Coleman*).

324 *Coleman*, 307 U.S. at 464 (Frankfurter, J., concurring); *see also id.* at 464-70 (Although a private citizen's claimed deprivation of his right to vote was judicially enforceable, an alleged violation of a political representative's voting rights could be resolved only by the legislature.). Frankfurter characterized standing as a "preliminary question" of Article III jurisdiction, which limited access to plaintiffs who had suffered "private damage." *Id.* at 468-70.

325 *Id.* at 460 (Frankfurter, J., concurring).

326 *Id.* at 463-64 & n.5 (Frankfurter, J., concurring) (citation omitted).

also cited the *Correspondence of the Justices* as establishing that "it is beyond our power . . . to give legal opinions, however solemnly requested and however great the national emergency."[327] Frankfurter acknowledged that the Court had sometimes departed from this historical view by resolving political disputes "clothed in the form of private litigation," but he urged rigorous judicial restraint.[328]

Justice Frankfurter's claim that "judicial power" in the eighteenth century had only one component—private common law actions brought by a plaintiff who had suffered a personal injury inflicted by an adverse defendant—ignored English practices such as advisory opinions and public actions (*e.g.*, prerogative writs) that permitted any citizen to challenge government conduct as unlawful regardless of personal injury.[329] Nor was Frankfurter's reliance on early case law persuasive. Indeed, *Hayburn's Case* contradicts his theory: The Court there upheld the standing of a third party with no personal stake in the outcome[330] and emphasized that it could alter English practice in response to changing circumstances.[331] Furthermore, the *Correspondence of the Justices*, which concerned a true advisory opinion—a formal political branch request for legal advice from the Court—is not relevant to *Coleman*, which involved claims that had already been litigated.[332] Frankfurter cleverly co-opted the historical term "advisory opinion" and gave it a new meaning: a judicial decision in a litigated case when a party lacked standing, presented an unripe or moot claim, or raised a political question.[333]

In short, Frankfurter's assertions of historical continuity masked the novelty of his vision of justiciability. He further refined his approach in *Joint Anti-Fascist Committee v. McGrath*.[334] There five Justices, each writing separately, upheld the plaintiffs' right to bring constitutional claims against the Attorney General, who had designated them

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327 *Id.* at 462 (Frankfurter, J., concurring).

328 *Id.* at 461 (Frankfurter, J., concurring).

329 *See supra* notes 33, 37-38 and accompanying text.

330 *See* Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792), discussed *supra* part I.C.1.

331 *Id.* at 414. Moreover, a few Justices suggested that equity might sometimes warrant an advisory opinion. *Id.* at 413 n.(a) (U.S.C.C.D.N.C.).

332 *See supra* part I.C.2.

333 *See* William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 272, 275-76, 279, 284-86 (1990).

334 341 U.S. 123, 150-60 (1951) (Frankfurter, J.). In the 12 years between *Coleman* and *McGrath*, the Court did not significantly change its approach to justiciability, and Frankfurter issued no major opinions on the subject, although he continued to preach judicial restraint. *See, e.g.*, United States v. Lovett, 328 U.S. 303, 319-20, 329-30 (1946) (Frankfurter, J., concurring) (arguing that the majority should have avoided deciding the constitutional question in light of the need for "scrupulous observance . . . of the professed limits of this Court's power . . . .").

Communists without notice or a hearing.[335] Justice Frankfurter agreed that the plaintiffs could proceed because they had suffered a substantial injury cognizable at common law (defamation),[336] but cautioned that he was not loosening justiciability rules.[337] Indeed, Frankfurter reiterated that Article III power was confined to eighteenth-century forms, as evidenced by *Hayburn's Case* and its progeny.[338] He argued that restricting federal courts "to issues presented in an adversary manner" reflected "[r]egard for the separation of powers" and "the importance to correct decision of adequate presentation of issues by clashing interests."[339]

Frankfurter emphasized that these "general[ ]" Article III limits had "myriad applications" to both "'standing to sue'" and the "more comprehensive[ ]" idea of "justiciable" disputes.[340] For example, Frankfurter's "standing" analysis included not only the familiar requirements of "adverse personal interest" and "legal injury,"[341] but also political question concerns[342] and factors that today would fall under the ripeness rubric (*e.g.*, the need to avoid "coming prematurely or needlessly in conflict with the executive or legislature").[343]

Justice Frankfurter's opinions in *Coleman* and *McGrath* have become the foundation of the modern justiciability doctrines.[344]

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335 All these Justices agreed that plaintiffs had standing and presented justiciable claims. *See McGrath*, 341 U.S. at 131, 135, 140-41 (Burton, J.); *id.* at 142-43 (Black, J.); *id.* at 174-75 (Douglas, J.); *id.* at 183-87 (Jackson, J.).

336 *Id.* at 157-60 (Frankfurter, J.).

337 *See id.* at 149-50 (Frankfurter, J.) ("[I]n a case raising delicate constitutional questions it is particularly incumbent first to satisfy the threshold inquiry whether we have any business to decide the case at all. Is there, in short, a litigant before us who has a claim presented in a form and under conditions 'appropriate for judicial determination?'").

338 *See id.* at 150 (Frankfurter, J.) (citations omitted).

339 *Id.* at 151 (Frankfurter, J.)

340 *Id.* at 150 (Frankfurter, J.) (citation omitted).

341 *Id.* at 151-52 (Frankfurter, J.). Absent an express congressional grant of standing, plaintiff had to show not merely an individual adverse interest, but also the existence of a "legal injury" (*i.e.*, that the government's action had directly affected plaintiff's interest rooted in the common law, the Constitution, or a statute). *Id.* at 151-54 (Frankfurter, J.).

342 *See, e.g., id.* at 149-50 ("The more issues of law are inescapably entangled in political controversies . . . the more the Court is under [a] duty to dispose of a controversy within the narrowest confines that intellectual integrity permits.").

343 *Id.* at 155; *see also id.* at 155-57 (examining the finality of challenged action, another element of ripeness).

344 Frankfurter's position that justiciability is an Article III jurisdictional requirement was accepted by the Court at different times for different doctrines. *See, e.g.*, Doremus v. Board of Educ., 342 U.S. 429 (1952) (standing); Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964) (mootness); Steffel v. Thompson, 415 U.S. 452, 458 (1974) (ripeness). Likewise, over the past 25 years, the Court has gradually adopted, and expanded, Frankfurter's separation-of-powers rationale for these doctrines. *See infra* part II.B.

3. *The Warren Court's Liberalization of Justiciability*

The Warren Court paid lip service to the notion that justiciability was a jurisdictional "limitation" based on Article III[345] and separation of powers,[346] but in reality increased judicial access dramatically to effectuate both its activist interpretation of the Constitution and Great Society legislation.[347] The Court pretended to honor justiciability precedent while effectively reversing it,[348] and correspondingly failed to set forth candidly its new separation-of-powers theory: that vigorous checking of the political branches to protect individual liberty was more important than efficiency.[349] Indeed, the Court based its justiciability decisions not on a reinterpretation of political theory and judicial history,[350] but rather on a vague "blend of constitutional requirements and policy considerations."[351] As the Warren Court never expressly repudiated the Frankfurterian analytical framework, the Burger and Rehnquist Courts could easily revivify it.

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345 *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 94-95 (1968) ("The jurisdiction of federal courts is . . . limited by Article III . . . to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."); *id.* at 99, 101.

346 *See, e.g., id.* at 94-95 (Article III "define[s] the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."); *id.* at 97 ("Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers . . . .").

347 *See, e.g.*, VINING, *supra* note 313, at 46; Stearns, *Historical, supra* note 310, at 350-52, 373-74, 383-85.

348 *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968) (granting federal taxpayers standing despite 45 years of contrary case law); Baker v. Carr, 369 U.S. 186 (1962) (upholding justiciability of voters' challenge to state apportionments in the face of solid precedent refusing to resolve such political questions). *See generally infra* notes 387-88, 396 (examining *Flast*); *infra* notes 510-15, 524-33, 575 and accompanying text (analyzing *Baker*).

349 The novelty of this approach can best be appreciated by recalling two bedrock principles of Federalist separation-of-powers theory. First, federal courts can legitimately exercise judicial review only to check majoritarian branch actions that clearly violate the Constitution—a rule followed by the Supreme Court throughout most of its first century (with notable exceptions like *Marbury* and *Dred Scott*) and revived after the New Deal. *See supra* notes 150, 155-57, 194, 211, 254-59, 280-81, 283, 295-97, 305 and accompanying text. By contrast, the Warren Court struck down numerous laws that did not clearly (or even arguably) violate any discernible constitutional principle. Second, classical theory held that the combination of judicial and legislative power destroys liberty by subjecting citizens to decisions based arbitrarily on the judge's personal opinion rather than pre-existing law. *See supra* notes 45, 57-58, 99, 116, 138-40, 146-48, 176 and accompanying text. Thus, Federalists would have found ironic the Warren Court's repeated assumption of legislative power under the guise of promoting individual liberty.

350 The Court did recognize justiciability's "uncertain historical antecedents." *Flast*, 392 U.S. at 95-96. Specifically, it questioned Frankfurter's premise that the justiciability doctrines reflected traditional English practice, because the earliest justiciability doctrine (the ban on advisory opinions) had departed from English custom. *Id.* However, the Court did not develop a competing historical account.

351 *Id.* at 97; *see also id.* at 98-99.

4. *Bickel: The Justiciability Doctrines As Unprincipled Devices to Avoid Constitutional Decisions*

In the middle of the Warren Court era, Justice Frankfurter's protege Alexander Bickel set forth a theory that would have a lasting impact on the Court.[352] Bickel argued that the Court should manipulate the "passive virtues" (justiciability and other abstention devices) to ensure that its substantive constitutional decisions are principled.[353] According to Bickel, judicial review is "counter-majoritarian" and thus a "deviant institution in the American democracy,"[354] but can be justified as instilling enduring constitutional values into representative government.[355] If the Court cannot reasonably find such fundamental principles to invalidate a law[356] but does not wish to uphold it for political reasons,[357] Bickel urged the unprincipled use of justiciability to evade decision[358]—a prudentialism radically different from that of Brandeis.[359]

Bickel perhaps accurately described the Court's actual practice, but that does not justify his thesis normatively. Bickel not only failed

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352 BICKEL, *supra* note 5. Although the Burger and Rehnquist Courts have never officially endorsed Bickel's thesis, as a practical matter they have followed his approach by developing malleable justiciability doctrines that enable the Court to exercise or decline jurisdiction based largely on unarticulated pragmatic considerations. *See infra* parts II.A.5. and II.B. Several Justices have cited Bickel with approval. *See, e.g.*, Nixon v. United States, 506 U.S. 224, 253 (1993) (Souter, J., concurring); United States v. Richardson, 418 U.S. 166, 188 n.8 (1974) (Powell, J. concurring); *see also* 3 DAVIS & PIERCE, *supra* note 161, at 27, 48, 95 (contending that Bickel's ideas have greatly influenced the Court).

353 *See* BICKEL, *supra* note 5.

354 *Id.* at 16, 18; *see also id.* at 17 ("[J]udicial review is undemocratic."); *id.* at 16-17 ("[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people . . . ."); *id.* at 19-23, 235 (to similar effect).

355 *Id.* at 24-28, 51, 58-59, 63, 69-70, 141, 188, 199, 203.

356 Bickel rejected Warren Court-style invalidation of a law the Justices perceive as unfair, even though it violates no constitutional principle. *See id.* at 54-55, 59, 69; *see also* Kurland, *supra* note 144, at 610 (decrying "judicial arrogance" in imposing personal policy preferences instead of applying constitutional text, history, and precedent); *supra* notes 348-49 (questioning Warren Court jurisprudence).

357 Bickel argued that the public mistakenly assumes that a decision upholding a law's constitutionality siguifies the Court's approval of its wisdom, thereby legitimating it. BICKEL, *supra* note 5, at 29-31, 69-70, 129-32, 205. Bickel's thesis contradicts itself because if citizens equate anything less than invalidation as judicial endorsement, then Bickel's proposed solution—refusing to decide—will also be perceived as legitimation. *See* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 7-8 (1964).

358 *See* BICKEL, *supra* note 5, at 68-71, 111-98, 200-01; *see also id.* at 112-13, 132, 205-07 (conceding that the suggested use of justiciability and similar techniques is unprincipled, unlike constitutional decisions on the merits).

359 Whereas Bickel advocated abstaining entirely, Justice Brandeis recognized his duty to decide cases but sought to avoid considering constitutional questions unnecessarily. *See supra* notes 308-09 and accompanying text (discussing Brandeis's approach); *see also* Gunther, *supra* note 357, at 9-10, 15-17, 20, 25.

to offer such a defense, he conceded that his approach was not based on the Constitution's text, history, or precedent.[360] Indeed, Bickel's theory turns American constitutionalism on its head. His central premise—that judicial review is undemocratic—assumes that elected officials are sovereign and that therefore any checks on them are presumptively illegitimate.[361]

On the contrary, in our democracy all government branches represent the sovereign People, and the judiciary's exercise of judicial review is not "deviant" but a vital check.[362] Moreover, Bickel's thesis subverts the rule of law and encourages tyranny by giving judges absolute discretion. When Congress, pursuant to its constitutional powers, grants jurisdiction consistent with Article III, the Court cannot decline to exercise it on grounds of expediency.[363] Finally, Bickel's approach disrupts governmental efficiency because officials do not know when

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360 BICKEL, *supra* note 5, at 16, 24, 39, 98-110.

361 *See* ACKERMAN, *supra* note 13, at 8, 261-62. Bickel believed the Court had to conserve its fragile legitimacy. *See* BICKEL, *supra* note 5, at 201-68. This was also Frankfurter's view:

> Disregard of inherent limits in the effective exercise of the Court's "judicial Power" . . . may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.

Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting); *accord* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 474 (1982) (Rehnquist, J.).

The Court's authority, however, is based not on transient public opinion, but on Article III of the super-majoritarian Constitution. Furthermore, the Court's legitimacy is hardly fragile, despite—or maybe because of—its willingness to make hard decisions. *See, e.g., Baker*, 369 U.S. at 262 (Clark, J., concurring) ("National respect for the courts is more enhanced through the forthright enforcement of [constitutional] rights rather than by rendering them nugatory through the interposition of subterfuges."). In any event, preserving credibility should be secondary to enforcing the Constitution. *See, e.g.*, CHEMERINSKY, INTERPRETING, *supra* note 7, at 104-07, 133-38.

362 *See supra* notes 150, 155-57, 175, 194, 211, 254-59 and accompanying text; *see also* REDISH, *supra* note 7, at 6, 76-78 (deeming "nonsensical" Bickel's characterization of judicial review as "deviant" because the Constitution itself creates a government that is "undemocratic" in that it imposes mandatory limits on the powers of the elected branches).

363 *See, e.g., supra* notes 108, 179, 195 and accompanying text; Gunther, *supra* note 357, at 15-16, 19, 21-22 (argning that jurisdictional rules are based on the Constitution and statutes, not merely the Court's wishes); *id.* at 13 (criticizing the "law-debasing effects of Bickel's prudential considerations").

In 1988, Congress repealed the Court's mandatory appellate jurisdiction. *See* 28 U.S.C. § 1257 (1988). Nonetheless, the Court does not claim that its discretion is unlimited; rather, it has set forth rules to gnide its decision to grant review (*e.g.*, the importance of the question and the need to resolve an inter-circuit conflict). *See* Wechsler, *supra* note 142, at 9-10 (discussing an earlier version of these rules). Furthermore, as Bickel recognized, the Court's justiciability doctrines bind the lower federal courts, whose jurisdiction is mandatory. *See* BICKEL, *supra* note 5, at 198.

or how the constitutionality of their actions will be determined.[364] In short, Bickel's proposed use of justiciability frustrates every aim of separation of powers.

5. *The Burger and Rehnquist Courts and the Frankfurterian Revival*

Chief Justice Burger, assisted by Justices Stewart, Powell, and Rehnquist, revitalized Frankfurterian restraint by applying justiciability rules strictly, adding requirements for each doctrine, and explaining more fully their separation-of-powers basis.[365] The Rehnquist Court, under the intellectual leadership of Justice Scalia, has continued this trend.[366] Justice O'Connor has perfectly summarized the Burger/Rehnquist Court approach:

> Article III of the Constitution confines the federal courts to adjudicating actual "cases" and "controversies." . . . [T]he "case or controversy" requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are "founded in concern about the proper—and properly limited—role of the courts in a democratic society."
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> . . . .
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> "All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."[367]

6. *Justiciability and Separation of Powers: A General Neo-Federalist Critique*

The above-quoted passage compresses several distinct but related ideas. The basic proposition is that federal judicial power is "limited," in the sense of being inferior to other types of governmental power.

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364 Bickel claimed, on the contrary, that his theory would promote efficiency. *See* BICKEL, *supra* note 5, at 173 ("Nor is it justice in a democracy to enlarge authoritarian judicial power at undue cost in the effective and responsible functioning of the political institutions.").

365 *See infra* part II.B. The Burger Court used the justiciability doctrines to contain the explosion of litigation to enforce public (especially constitutional) rights. *See* Fletcher, *supra* note 308, at 227-28; *see also* C. Douglas Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862 (1985) (defending this restrictive approach as consistent with separation of powers).

366 *See infra* notes 405-10, 416-19, 435-49, 457-58, 471-72, 481, 504, 516-17, 556-57 and accompanying text.

367 Allen v. Wright, 468 U.S. 737, 750 (1984). The second paragraph of the cited passage quotes Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring).

Because federal judges are unelected and thus "unrepresentative," they are especially limited in their ability to examine the actions of the "democratic" political branches. Accordingly, the justiciability doctrines must be designed to restrict federal court adjudication (especially judicial review) to those rare instances when the government's conduct violates an individual's private law, nonpolitical rights.[368]

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368 The Court's formalistic approach to justiciability conflicts with its "functional" line of general separation-of-powers decisions, which apply a "pragmatic, flexible" test: Separation of powers is violated only by actions that either "accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate branch." *See* Mistretta v. United States, 488 U.S. 361, 381-82 (1989).

Mistretta upheld a statute that established the U.S. Sentencing Commission, an independent agency within the judicial branch (three of whose seven members were federal judges) authorized to promulgate criminal sentencing guidelines. The Court recoguized that the justiciability doctrines "ensure[d] the independence of the Judicial Branch by precluding debilitating entanglements between the Judiciary and the two political Branches, and prevent[ed] the Judiciary from encroaching into areas reserved for the other Branches by extending judicial power to matters beyond those disputes 'traditionally thought to be capable of resolution through the judicial process.'" *Id.* at 385 (citations omitted). But the Court emphasized historical exceptions to these principles when Congress had assigned to judges rulemaking or administrative functions necessary for the efficient fulfillment of their central responsibilities (*e.g.*, promulgation of rules concerning procedure and evidence). *Id.* at 387-90 (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825)). The Court compared such rulemaking to the Commission's issuance of sentencing guidelines and held that the greater political judgment involved in the latter did not render the Act unconstitutional. *Id.* at 390-97. Nor did requiring judges to serve undermine the integrity or impartiality of the judiciary, because (1) judges had historically rendered extra-judicial services as individuals (rather than as a "court"); and (2) they were applying their expertise to formulate rules that would govern only the judiciary in exercising their exclusive function of sentencing criminals. *Id.* at 397-408. Finally, the Court concluded that empowering the President to appoint and remove judge-commissioners did not affect their independence in exercising their judicial function of "fairly adjudicating cases and controversies." *Id.* at 411.

The Court did not grasp that Congress's commandeering of federal judges into an independent agency along with non-judges, and its granting of appointment and removal power to the President, posed a far graver threat to separation of powers than its requesting the Court *qua* Court to exercise procedural rulemaking authority ancillary to the exercise of judicial power (as in *Wayman*). *See id.* at 413-27 (Scalia, J., dissenting); *see also supra* note 231 (explaining why the Court's procedural rulemaking does not violate separation of powers).

Similarly, in Morrison v. Olson, 487 U.S. 654 (1988), the Court acknowledged that Article III prohibits imposing on federal judges executive or administrative duties of a nonjudicial nature, but upheld a statute that granted a "Special Division" court of three federal judges the executive power to appoint, monitor, and terminate independent counsel charged with investigating and prosecuting executive branch wrongdoing. The Court relied on Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792). *See Morrison*, 487 U.S. at 677 n.15. It is unclear why Congress's grant of non-adjudicatory functions to a federal court in *Hayburn's Case* was unconstitutional, yet bestowing such powers on the Special Division "court" was permissible.

In short, the Court has failed to explain how separation of powers allows federal judges to perform tasks that are purely "legislative" (*Mistretta*) and "executive" (*Morrison*), but prohibits them from vigorously exercising "judicial" power—as the justiciability decisions hold. *See* MARTIN H. REDISH, FEDERAL JURISDICTION 15-22 (2d ed. 1990); Krent, *supra* note 163, at 1298-1322.

Far from "defin[ing] with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded,"[369] the current justiciability doctrines have inverted it. Under Federalist theory, the sovereign People delegated certain powers to their agents in the national government—legislative, executive, and judicial. Although the judiciary is limited by the Constitution, so are the other two departments. And federal courts have power coextensive with—not inferior to—that of the political branches.[370]

Moreover, federal judges are not "unrepresentative" because they are "unelected." Rather, the People chose to remove judges from the electoral process to ensure their independence in vindicating federal law—especially upholding the Constitution against transient majoritarian pressures.[371] Because constitutional violations can be committed only by government actors, federal courts inevitably will have to "interfere" with (*i.e.*, check) the majoritarian branches when the latter exceed their constitutional bounds.[372]

In short, separation of powers in our democracy is frustrated by justiciability doctrines that permit courts to abdicate their role of enforcing federal law.[373] Federalist principles require federal judges to exercise all their statutory jurisdiction unless (1) the political branches have attempted to obtain legal advice outside the litigation context; (2) Congress or the President has disregarded the finality of

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369 *Allen*, 468 U.S. at 750.

370 *See supra* notes 88-92, 96-97, 101, 105, 115-16, 125-37, 143-59, 182-90, 193-98, 204-11, 277 and accompanying text. *Cf.* George D. Brown, *Article III as a Fundamental Value—The Demise of* Northern Pipeline *and Its Implications for Congressional Power*, 49 OHIO ST. L.J. 55, 80-82 (1988) (contending that the Court's belief in the federal judiciary's inferior status explains both its curtailment of standing and its approval of legislative schemes that remove federal law matters from Article III tribunals).

371 *See supra* notes 122-32, 136-50, 171-76, 205-11, 228-31, 277 and accompanying text.

372 *See id.*

373 Scholars who have made this point include ACKERMAN, *supra* note 13, at 261-65; CHEMERINSKY, INTERPRETING, *supra* note 7, at 1-2, 5-24, 86-105; REDISH, *supra* note 7, at 4-7, 75-88; Wayne McCormack, *The Justiciability Myth and the Concept of Law*, 14 HASTINGS CONST. L.Q. 595, 599-602, 612, 629-30, 634 (1987) [hereinafter McCormack, *Justiciability*]; and Winter, *supra* note 33, at 1381, 1503, 1508-13.

For contrary views, see, e.g., Jonathan Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175 (1990) (contending that the judiciary should allow Congress and the President to resolve disputes over constitutional allocation of power through political negotiation, except in rare cases when the action of the elected branches contradicts an express constitutional provision); Charles Silver, Book Review, *American Political Theory Reconsidered*, 60 GEO. WASH. L. REV. 562, 578-82 (1992) (arguing that political accountability and the good-faith efforts of officials to comply with the Constitution are as important as judicial enforcement in ensuring obedience to limited, democratic constitutional rule); James G. Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules that Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior*, 40 BUFF. L. REV. 645 (1992) (claiming that the exercise of many constitutional powers, including impeachment and foreign affairs, should be governed not by legal standards enforced by courts, but rather by political conventions developed by the majoritarian branches and citizens).

judicial orders, especially by reserving power to revise them; or (3) a political question has been presented.[374]

The foregoing critique assumes that Federalist ideas are still relevant, for two reasons. First, the Court has claimed that its justiciability doctrines incorporate them. Second, the Framers' tenets remain useful in understanding the theory and practice of modern American government.[375] Specifically, the mushrooming of the federal government has made separation of powers the most effective mechanism to diffuse power and thereby safeguard liberty.[376] Indeed, this Federalist structural principle applies today with undiminished force to the relationships among the three departments named in the Constitution

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374 Consistent with Federalist precepts, the Court has rejected all congressional attempts to tamper with the final judgments of federal courts, most recently in Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995). However, the Court has twisted the Framers' understanding of advisory opinions and political questions to rationalize its current approach to justiciability. *See supra* parts I.C, I.D, and II.A.

The standing, ripeness, mootness, and political question doctrines all rest on the erroneous assumption that minimizing review of political branch actions constitutes judicial restraint. In reality, exercising too little judicial power offends separation of powers as much as exercising too much power. *See, e.g.*, CHEMERINSKY, INTERPRETING, *supra* note 7, at 55; Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915, 1940-41 (1986) [hereinafter Nichol, *Injury*]. Moreover, the Court's justiciability doctrines have done little to assure its restraint in fashioning substantive constitutional rules. *See* REDISH, *supra* note 7, at 94-96.

375 *See, e.g.*, *supra* note 13; ACKERMAN, *supra* note 13, at 19-20, 35, 260-61, 304 (Historical constitutional principles must be the starting point for modern American self-definition.).

For example, popular sovereignty helps explain the dramatic changes wrought by Reconstruction and the New Deal: The People exercised their right to (1) reallocate power from states to the national government; and (2) redistribute power among the latter's three branches. Obviously, the New Deal shattered the Founders' belief that federalism would limit the central government. *See supra* part II.A.2. Furthermore, the likeliest source of tyranny has shifted from the legislature (the Federalists' *bete noire*) to the executive. *See, e.g.*, Alfange, *Normalcy*, *supra* note 76, at 721. Despite these changes, however, Federalist ideas—especially popular sovereignty and separation of powers—remain important. *See, e.g.*, Sunstein, *Constitutionalism*, *supra* note 298, at 421-52, 483-510 (contending that reinvigoration of the Framers' separation-of-powers theory can ameliorate problems of the modern administrative state, even though we cannot revert to their conceptions of limited government and exclusively common law definitions of legal entitlements).

376 *See* VILE, *supra* note 21, at 2, 7, 11; *see also* ACKERMAN, supra note 13, at 259-61 (Separation of powers is still a sensible governing principle, although it must be modified to reflect the modern dominance of the Presidency vis-a-vis Congress.); Redish & Cisar, *supra* note 106, at 452-53, 472-73 (arguing that the fear of government tyranny that justified separation of powers in 1787 remains strong today); ACKERMAN, *supra* note 13, at 259-61.

While liberty increasingly has been protected through judicial vindication of individual constitutional rights, it does not necessarily follow that it cannot also be safeguarded through separation of powers, as some have argued. *See, e.g.*, Kurland, *supra* note 144 at 611-13; *see also* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1513-17 (1991) (Separation-of-powers analysis should focus not on structural concerns but on "ordered liberty"—the protection of individual rights, especially due process, against the government's arbitrary conduct.).

(Congress, the President, and the Supreme Court).[377] Those institutions, in turn, must control the administrative agencies that concededly combine governmental functions.[378] In fact, the huge growth of executive agencies has not resulted in tyranny primarily because of congressional oversight and judicial review.[379]

As the Court has abetted the government's expansion by generously construing Articles I and II, it must correspondingly interpret Article III so that judicial power remains coordinate with legislative and executive authority.[380] This Federalist coextensiveness principle

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377 Although the Framers could not have envisioned this century's expansion of federal governmental power and the particular overlaps among the branches that have developed, the classical distinctions between the core functions of each department remain meaningful. First, Congress has retained the basic legislative power to enact general laws, and it can revoke any delegations of partial rulemaking authority. Thus, executive agencies do not *control* both the making and execution of federal law. *See* Samuel W. Cooper, Note, *Considering "Power" in Separation of Powers*, 46 STAN. L. REV. 361, 388-93 (1994). Second, the President still has the authority to execute the laws, although the results of his administration may be scrutinized by the other branches. *See infra* notes 378-80 and accompanying text. Third, federal courts have continued to exercise the power to interpret federal law definitively in litigated cases. *See infra* note 380; *see also* Stephen L. Carter, *From Sick Chicken to* Synar*: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719 (Judicial interpretation of separation of powers can legitimately focus only on ascertaining and enforcing the Constitution's original meaning, and if that meaning cannot be determined then courts should abstain under the political question doctrine.).

378 Two commentators bave provided especially illuminating studies of this problem. First, Professor Sunstein has described the administrative failures caused by the New Deal's rejection of constitutional checks and balances in favor of swift, centralized administration by a powerful President and independent technocratic agencies. Sunstein, *Constitutionalism, supra* note 298, at 421-22, 446-52. He praises recent efforts by all three branches to assert a more forceful supervisory role over previously autonomous agencies. *Id.* at 452-83. Sunstein argues that a system of aggressive, coordinated review of the administrative process can replicate the structural safeguards and goals of the original constitutional design—promoting the rule of law, accountability, efficiency, and deliberativeness—while preventing self-interested representation and factionalism. *Id.* at 421-22, 430-37, 446-52, 483-510.

Second, Professor Strauss has emphasized that the Constitution vests power in three political heads (Congress, the President, and the Supreme Court) and gives each ultimate authority over a distinct type of governmental power; by contrast, the Constitution leaves the creation and structuring of administrative organs to Congress's discretion. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984). Therefore, he contends that separation-of-powers analysis should focus on ensuring that each of the three actors named in the Constitution has retained meaningful functional control over every administrative agency. *Id.* at 575-81, 639-69.

379 *See, e.g., id.*; *see also* Abram Chayes, *The Supreme Court, 1981 Term-Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 60 (1982) (observing that courts have become partners with the legislature in ensuring executive compliance with the law).

380 Although Congress may employ legislative courts and executive agencies for initial adjudications, only appellate review by an independent Article III court can preserve separation of powers by checking these political tribunals when they aggrandize power, make arbitrary decisions, or pursue a political agenda not authorized by law. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988) [hereinafter Fallon, *Article III*]; *see also* Henry P. Monaghan, Marbury *and the Admin-*

has been weakened by modern justiciability rules, which leave most public law unchallengeable in order to promote governmental efficiency. The justiciability doctrines must be reevaluated to account for the judiciary's coequal role in maintaining checks and balances and the rule of law.

B. Reformulating the Justiciability Doctrines According to Neo-Federalist Principles

The standing, mootness, ripeness, and political question doctrines could be clarified significantly by applying Neo-Federalist principles of separation of powers.

1. *Standing and Separation of Powers*

a. *The Injury, Causation, and Redressability Requirements*

The Court's current teaching is that separation of powers requires

> a party seeking to invoke a federal court's jurisdiction [to] demonstrate three things: (1) "injury in fact," by which we mean an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical" . . . ; (2) that the injury "fairly can be traced to the challenged action of the defendant" . . . ; and (3) a likelihood that the injury will be redressed by a favorable decision . . . .[381]

These injury, causation, and redressability requirements have evolved over seven decades.

The earliest modern standing decision, *Frothingham v. Mellon*,[382] rejected a taxpayer's constitutional challenge to a federal statute because she had not suffered a "direct injury": Her interest was "shared with millions" and thus "minute and indeterminable," and statutory administration was "a matter of public and not of individual concern."[383] The Court stressed that its holding preserved the total separation of powers required by the Constitution.[384] In 1937, the Court denied a citizen standing to claim that Hugo Black was ineligible to serve as a Justice, citing *Frothingham* for the proposition that

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istrative State, 83 COLUM. L. REV. 1 (1983) [hereinafter Monaghan, *Marbury*] (contending that the *Marbury* Court's assertion of judicial power to exercise independent judgment in enforcing the statutory duties of executive officials is essential to the legitimacy of the modern administrative state).

381 Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 663 (1993) (citations omitted).

382 262 U.S. 447 (1923). For an excellent summary of standing before *Frothingham*, see Winter, *supra* note 33, at 1417-44.

383 262 U.S. at 487-88.

384 *Id.* at 488-89.

> to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained . . . a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.[385]

Subsequently, Justice Frankfurter persuaded the Court to justify its limited role in public affairs on historical grounds.[386]

The Warren Court deemed separation of powers irrelevant to standing[387] and accordingly repudiated *Frothingham*.[388] The Burger Court, after initially following this approach,[389] reaffirmed the separa-

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385 *Ex parte* Levitt, 302 U.S. 633, 634 (1937) (per curiam). Levitt argued that Black had been a member of a Senate that had helped enact a statute to increase judges' compensation, thereby making him ineligible to hold judicial office under Article I, § 6 of the Constitution.

386 *See supra* part II.A.2.b.

387 The Warren Court held that Article III standing analysis should focus solely on whether a plaintiff was the "proper party" to bring an action, as evidenced by his "personal stake in the outcome" sufficient to assure the "concrete adverseness" needed to decide legal questions properly. Flast v. Cohen, 392 U.S. 83, 99-101 (1968) (citing Baker v. Carr, 369 U.S. 186, 204 (1962)). By contrast, separation of powers did apply to the political question and advisory opinion doctrines, which considered the substantive legal questions presented. *Flast*, 392 U.S. at 95, 97, 99-101. The Court acknowledged that the distinction between the standing of the party and the justiciability of the issues had been unclear in previous cases. *Id.* at 100 n.21; *see also* Scalia, *supra* note 6, at 892 (pointing out that this distinction makes little sense, because if all persons who can raise an issue lack standing, then the issue itself is excluded).

388 *See* Flast v. Cohen, 392 U.S. 83 (1968) (granting taxpayers standing to claim that congressional spending for religious schools violated the Establishment Clause). The Court created a new test for taxpayer standing and found it had been satisfied: Plaintiffs had shown a nexus between their taxpayer status and (1) the type of statute attacked (one enacted under Article I's taxing and spending clause); and (2) the nature of the constitutional infringement alleged (the Establishment Clause—a specific constitutional protection against the abuse of legislative power). *Id.* at 102-06. The Court weakly distinguished *Frothingham* on the ground that it did not meet the second criterion. *Id.* at 103-06. *But see id.* at 116-29 (Harlan, J., dissenting) (arguing that the Court had "reduc[ed] standing to a word game played by secret rules" by relabeling public interests held by all citizens as personal/proprietary rights in tax funds).

The Court permitted a similarly broad class (voters) to raise constitutional claims in Baker v. Carr, 369 U.S. 186 (1962), discussed *infra* notes 510-15, 525-31 and accompanying text.

389 For example, the Court rejected the separation-of-powers argument that plaintiffs with generalized grievances lacked standing: "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." United States v. SCRAP, 412 U.S. 669, 688 (1973).

The Burger Court also recharacterized "injury" as primarily a *factual* inquiry, whereas previously it had always been defined as harm to a plaintiff's *legal* interest (*i.e.*, a right arising under the common law, a statute, or the Constitution). *See, e.g.*, Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151-55 (1970); 3 DAVIS & PIERCE, *supra* note 161, at 3-13 (applauding this shift, which responded to Professor Davis's call for the application of a looser "injury in fact" requirement for standing under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702(a)). *But see* Stearns, *Historical*, *supra* note 310, at 400-03 (showing that *Camp* erroneously interpreted the APA). The Court recognized Congress's power to grant standing generally to citizens to vindicate rights under broad public laws,

tion-of-powers rationale for standing in two 1974 decisions. First, *United States v. Richardson*[390] held that a taxpayer had no standing to allege that a statute authorizing secret CIA expenditures violated Article I's requirement that Congress provide a "Statement and Account" of all expenses.[391] The Court characterized the claim as a "'generalized grievance[ ] about the conduct of government'" and thus beyond judicial cognizance.[392] Second, in *Schlesinger v. Reservists Committee to Stop the War*,[393] the Court denied citizens standing to assert that Congressmen's service in the military reserves violated the Constitution—an abstract claim about government operations that affected all citizens equally:[394]

> To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature, and open the Judiciary to an arguable charge of providing "government by injunction."[395]

Applying similar logic in the 1982 *Valley Forge* case, the Court rejected the standing of taxpayers to bring an Establishment Clause challenge against the federal government's grant of property to a religious institution.[396] The Court did, however, emphasize the traditional rule that

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and accordingly expanded the categories of cognizable "injury" to include noneconomic interests such as aesthetic enjoyment of the environment. *See, e.g.*, *SCRAP*, 412 U.S. at 683-90; Sierra Club v. Morton, 405 U.S. 727, 732-40 (1972).

The Court gradually transformed this statutory "injury in fact" test into an Article III requirement for standing to raise any claims—including those arising under the Constitution. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498-501 (1975); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 58-60 (1976) (Brennan, J., concurring) (decrying this shift). Divorcing the injury standard from the underlying legal claim caused the standard to become incoherent and manipulable. *See, e.g.*, Fletcher, *supra* note 308, at 223-24, 229-34, 248-50, 256-64, 268-70; Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1154-62 (1993) [hereinafter Nichol, *Justice Scalia*]; Cass R. Sunstein, *What's Standing After* Lujan *? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166-67, 183-92, 222-23, 235-36 (1992) [hereinafter Sunstein, *Lujan*].

390 418 U.S. 166 (1974).

391 *See id.* at 166-70 (citing U.S. CONST. art. I, § 9, cl. 7).

392 *Id.* at 175 (citation omitted); *see also id.* at 176-78 (citing *Ex parte* Levitt, 302 U.S. 633 (1937)); *Richardson*, 418 U.S. at 179 ("It can be argued that if [plaintiff] is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process."); *id.* at 188 (Powell, J., concurring) ("[A]llowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government.").

393 418 U.S. 208 (1974).

394 *Id.* at 209-28 (citing U.S. CONST. art. I, § 6, cl. 2 prohibition against members of Congress from simultaneously holding office in the executive branch).

395 *Id.* at 222 (citation omitted).

396 Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982). The Court explained:

its unwillingness to hear such generalized grievances (either constitutional or statutory) reflected merely "prudential" concerns for maintaining separation of powers, which Congress could overcome by expressly granting standing.[397]

Finally, the Burger Court created two new Article III standing requirements—causation and redressability[398]—and asserted that they also had to be applied in light of the "fundamental notion of separation of powers": "[F]ederal courts may exercise power only 'in the last resort' . . . and only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process . . . .'"[399] For example, in *Allen v. Wright*,[400] parents of black public-school children claimed that the IRS had unlawfully failed to deny tax-exempt status to racially discriminatory private schools.[401] The Court conceded that the plaintiffs had suffered an injury—their children's diminished ability to get an education in integrated public schools.[402] Notwithstanding this fact, it held that this harm was not directly caused by the challenged government conduct (the tax exemptions), as distin-

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> The exercise of the judicial power also affects relationships between the coequal arms of the National Government. . . . Proper regard for the complex nature of our constitutional structure requires . . . that the Judicial Branch . . . [not] accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury.

Id. at 473-74. *Valley Forge* eviscerated Flast v. Cohen, 392 U.S. 83 (1968), discussed *supra* notes 387-88.

397 *See Valley Forge*, 454 U.S. at 474-75; *see also* Allen v. Wright, 468 U.S. 737, 751 (1984); Warth v. Seldin, 422 U.S. 490, 500-01, 512-14 (1975); *supra* note 313 and accompanying text (describing the New Deal Court's deference to broad statutory conferrals of standing).

398 *See, e.g.*, Linda R.S. v. Richard D., 410 U.S. 614, 617-19 (1973). Before the mid-1970s, the Court had never articulated a separate "redressability" component and had mentioned "causation" only in passing in *Flast*, 392 U.S. at 102; *Ex parte* Levitt, 302 U.S. 633, 634 (1937); and Frothingham v. Mellon, 262 U.S. 447, 488 (1923). These requirements are best illustrated by Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976). In *Simon*, poor patients who had been refused service by tax-exempt hospitals challenged an IRS rule that did not require such hospitals to provide care for indigents. The Court denied standing because the plaintiffs had failed to show that (1) the defendant IRS—as opposed to the hospital—had caused the plaintiffs' injury; and (2) the requested relief (invalidating the IRS ruling) would remedy the injury, because the hospitals might still deny medical services to the poor for some non-tax reason. *Id.* at 40-46.

399 *Allen*, 468 U.S. at 752 (citations omitted). The Court conceded that injury, causation, and redressability could not be precisely defined, but asserted that application of these concepts to specific cases in light of separation of powers would clarify the law. *See id.* at 751-52; *see also id.* at 752 ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers."). *But see* Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 636-37, 641-49, 652 (1985) (criticizing the *Allen* Court for treating separation of powers as part of the Article III inquiry rather than as one minor, prudential rationale for standing).

400 468 U.S. 737 (1984).

401 *Id.* at 739-46.

402 *Id.* at 756.

guished from the independent actions of third parties (*i.e.*, parents of private-school children and those schools' officials).[403] The Court concluded that the plaintiffs were making a general complaint about an agency's internal programs—a matter best left to the elected branches.[404]

The Rehnquist Court further constricted standing in *Lujan v. Defenders of Wildlife*,[405] which concerned a statute that requires government agencies to consult the Secretary of the Interior to ensure that their projects do not threaten endangered species.[406] In an opinion by Justice Scalia, the Court rejected the plaintiffs' standing under the Act's provision that "any person" could sue to enjoin agency violations of the law, holding that Congress could not create a generally enforceable procedural right to have executive officials follow the statutory consulting guidelines.[407]

Justice Scalia made the novel assertion that the bar against deciding such generalized grievances was an Article III requirement, not merely a prudential rule.[408] He conceded that the cases he relied upon had involved alleged constitutional (rather than statutory) violations, but concluded:

> [T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement . . . , they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches.[409]

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403 *Id.* at 757. The Court deemed it "speculative" whether withdrawal of the tax exemptions would affect public school integration—for example, by causing private school officials to change their policies or white parents to transfer their children to public schools. *Id.* at 758-59. The dissenters argued that tax exemptions to private schools constituted financial support that directly resulted in the promotion of unlawful segregation in public schools. *See id.* at 766-83 (Brennan, J., dissenting); *id.* at 783-95 (Stevens, J., dissenting).

404 *Id.* at 760-61.

405 504 U.S. 555 (1992).

406 Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 892 (1973) (codified as amended at 16 U.S.C. § 1536 (1994)). A federal agency had interpreted this requirement as not applying to projects outside the United States. *See Lujan*, 504 U.S. at 558-59 (citing statutory and regulatory provisions).

407 *Lujan*, 504 U.S. at 571-73 (citing 16 U.S.C. §1540(g)). The Court also denied standing on the ground that plaintiffs—including scientists who studied endangered species abroad—had not personally suffered any injury because they had not been directly affected by the extinction of species allegedly caused by the regulation. *Id.* at 566-67.

408 *Id.* at 573-76. Justice Scalia relied on a series of cases (*e.g.*, *Frothingham*, *Levitt*, *Richardson*, *Schlesinger*, and *Valley Forge*) that had prohibited judicial resolution of such generalized claims on prudential grounds. *See supra* notes 382-85, 390-97 and accompanying text.

409 *Lujan*, 504 U.S. at 576.

The Court stressed that its role was solely to vindicate individual rights, whereas the political departments addressed majoritarian concerns—including the public interest in the government's observance of the law.[410]

b. *The Court's Historical Justification for Standing and Separation of Powers*

The Court has failed to articulate a persuasive historical rationale for its view of standing. Indeed, it often simply makes unsupported assertions about the Framers' understanding,[411] such as Chief Justice Burger's justification for restricting citizen standing:

> Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a *representative* government with the representatives directly responsible to their constituents. . . . [T]hat the Constitution does not afford a judicial remedy does not . . . completely disable the citizen . . . [who has] the right to assert his views in the political forum or at the polls . . . . [O]ur system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.[412]

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410 *Id.* at 576-78. *Lujan* implemented Scalia's 1983 scholarly argument that standing promotes separation of powers by (1) restricting courts to their traditional role of protecting individual and minority rights against majoritarian tyranny; and (2) preventing the judiciary from hearing generalized grievances that the government has violated the law, which implicate the majority's interests and thus can be addressed only by the political branches. *See* Scalia, *supra* note 6, at 894-97.

411 *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 476 (1982) (Standing limitations are "part of the basic charter promulgated by the Framers of the Constitution of Philadelphia.").

412 United States v. Richardson, 418 U.S. 166, 179 (1974). Justice Powell argued that citizen suits should be disallowed for the same reason the Framers had declined to create a Council of Revision: The people's rights must be protected primarily by the political branches, with the judiciary acting only in the last resort. *See id.* at 189-91 (Powell, J., concurring); *see also* Logan, *supra* note 14, at 63-64 (to similar effect).

This analogy is unpersuasive. The Convention rejected the Council of Revision, a judicial-executive committee charged with reviewing legislative bills, to prevent judges from making policy and from rendering biased judicial opinions on laws they had previously reviewed. *See supra* notes 172-74, 228-29 and accompanying text. The Founders shielded judges from such political activities to ensure their independence in exercising judicial power, which in the 18th century included the adjudication of citizen suits. *See supra* notes 33, 37-38, 197 and accompanying text; *see also* Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 93-94 (1984) [hereinafter Nichol, *Rethinking*] (arguing that the Framers' rejection of a Council of Revision, which had been proposed to examine the wisdom of legislation during the enactment process, does not support narrowing judicial review of the constitutionality of political branch action already taken).

Burger failed to grasp that "the Founding Fathers," far from trusting "the political forum" and "the polls" to remedy constitutional violations, removed certain issues from the political process precisely because it might not sufficiently protect constitutional values.[413] Indeed, he ignored basic Federalist principles: that elected officials possess only the power delegated to them by the Constitution, and that courts represent the People by remedying political branch actions that exceed constitutional limits.[414]

The Court's use of standing to avoid judicial review reflects its belief that "neither department may invade the province of the other and neither may control, direct or restrain the action of the other."[415] The notion that the Constitution requires total separation of powers, however, conflicts with its system of checks and balances—including judicial review.[416] To be sure, an overemphasis on checking can obscure the Constitution's basic structural apportionment of different primary functions to each branch. Thus, the Court has properly emphasized that the Founders' conception of separation of powers reflected their "common understanding" about the nature of legislative, executive, and judicial power.[417]

The law of standing, however, frustrates this shared understanding. In particular, the Court's claim that the Federalists created a supreme Congress, a restrained Presidency, and an even-more circumscribed judiciary inverts their true purpose: to neutralize legislative power by greatly strengthening executive and judicial authority.[418]

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413 *See, e.g.*, CHEMERINSKY, INTERPRETING, *supra* note 7, at 28-29, 99-100; Doernberg, *supra* note 25, at 99-102; Joseph J. Giunta, Comment, *Standing, Separation of Powers, and the Demise of the Public Citizen*, 24 AM. U. L. REV. 835, 840-43, 875-76 (1975); Winter, *supra* note 33, at 1381.

414 *See supra* part I.B.

415 Frothingham v. Mellon, 262 U.S. 447, 488 (1923).

416 For example, Justice Scalia began his essay on standing by quoting with approval the Massachusetts Constitution of 1780, pt. I, art. 30, which mandated absolute separation of powers—a principle assertedly incorporated into the federal Constitution. *See* Scalia, *supra* note 6, at 881. Apparently, he does not realize that our Constitution does not require total separation and that a proposed 1789 amendment modeled on the Massachusetts provision was rejected. *See supra* notes 73, 93, 161-62, 170 and accompanying text.

417 *Lujan*, 504 U.S. at 560; *see also Frothingham*, 262 U.S. at 488 ("The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts.").

418 Justice Scalia has cited Madison for the proposition that the Framers considered legislative power to be plenary, "whereas 'the executive power [is] restrained within a narrower compass' and . . . 'the judiciary [is] described by landmarks still less uncertain.'" *Lujan*, 504 U.S. at 560 (citing THE FEDERALIST No. 48, at 256). He then argues that one such "landmark" limiting the judiciary is standing. *Id.*

However, the sentence Scalia quotes simply acknowledges that legislative power has an inherent primacy because it must be exercised before a law exists for the executive and judiciary to act upon. *See supra* notes 28, 115 and accompanying text. Madison's theme is

That is not to say that Article III's reference to "judicial power" did not impose certain restrictions on federal courts, but only that those limits are not maintained by current standing requirements.[419]

The only plausible historical support for standing is the first part of *Marbury*, wherein Chief Justice Marshall indicated that an executive official's performance of his statutory duty was judicially examinable only if a plaintiff had been injured thereby.[420] The modern Court's invocation of this language as exemplifying judicial deference to the executive is ironic because Marshall actually issued a gratuitous political broadside against the President.[421] Moreover, the second part of the *Marbury* opinion justified judicial review not as incidental to remedying a private injury, but rather as necessary to uphold the supreme Constitution against inconsistent legislation.[422] Indeed, the Court recognized that its decision had ramifications far beyond redressing Marbury's injury.[423]

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that America's pre-1788 governments had distorted this idea by granting legislatures nearly all power, and that the Constitution would avoid legislative tyranny by creating strong executive and judicial departments. *See* THE FEDERALIST No. 48; *see also supra* part I.B. Moreover, Madison endorsed the related concept that if Congress enacts a statute, it must be executed by the President and interpreted definitively by the courts. *See supra* notes 115-16, 159 and accompanying text. Justice Scalia's approach to standing subverts the Madisonian coextensiveness principle.

419 Such limits include acting solely at the request of an outside party in a public judicial proceeding, interpreting (rather than making or executing) the law, and providing reasoned opinions. *See supra* notes 35-39, 112-14, 152, 154, 157, 175 and accompanying text; *see also* REDISH, *supra* note 7, at 89-90, 104 (contending that the injury requirement is unnecessary to ensure that the judiciary respects its bounds). *Cf.* Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1040-41 (1968) (asserting that standing doctrine imposes arbitrary restrictions that bear little relation to the Court's capacity to issue substantive decisions that have broad or negative effects, or both).

420 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 154-73 (1803), *cited in Lujan*, 504 U.S. at 576; Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 473-74 (1982); United States v. Richardson, 418 U.S. 166, 171 (1974). Two other frequently cited Federalist Court opinions—*Hayburn's Case* and the *Correspondence of the Justices*—undermine rather than support modern standing doctrine, for reasons already detailed. *See supra* notes 199-232, 330-33 and accompanying text.

421 *See supra* notes 242-44, 258-59 and accompanying text.

422 *See supra* notes 251-53 and accompanying text; *see also* Monaghan, *Adjudication*, *supra* note 223, at 1370-71. The Court did state that its exercise of judicial review was necessary to decide the "particular case." *Marbury*, 5 U.S. (1 Cranch) at 178. It did not hold, however, that all such specific cases required an individual injury. Again, modern standing decisions that cite *Marbury* to justify limitations on judicial review are ironic, given Marshall's willingness to reach the constitutional question through a strained statutory construction and his invalidation of a law that rested on a reasonable interpretation of the Constitution. *See supra* part I.C.3.b.

423 For example, the Court justified its opinion on the ground that the "delicacy," "novelty," and "difficulty" of the issues "require[d] a complete exposition of the principles" involved. *Marbury*, 5 U.S. (1 Cranch) at 154. *See* REDISH, *supra* note 7, at 91-92; Winter, *supra* note 33, at 1416.

Marbury thus requires a personal injury only when a plaintiff claims that an executive officer has failed to comply with a statute. However, Marshall suggested that such an injury can be found fairly easily,[424] and he did not foreclose the possibility that Congress could grant broader standing. Moreover, *Marbury* nowhere held that a showing of an individual, private law injury is *necessary* to allege a violation of the Constitution, although it is undoubtedly *sufficient.*[425]

Unlike injury, the "causation" and "redressability" requirements have little historical pedigree.[426] The Court's attempt to justify its refusal to redress certain injuries on classical separation-of-powers grounds[427] is especially ironic in view of the Blackstonean maxim that the violation of every legal right must have a judicial remedy—a principle Federalists considered essential to the preservation of liberty and the rule of law.[428]

In short, standing has become theoretically incoherent because the Court has invoked vague, ahistorical "separation-of-powers" notions to guide the application of malleable concepts like injury, causation, and redressability. Standing can, however, be clarified by focusing directly on genuine Federalist postulates.

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424 Marshall manufactured an injury by implying a quasi-property right from a vague statute. *See supra* notes 238-42 and accompanying text. Thus, *Marbury* illustrates that the manipulability of the "injury" concept is not a recent phenomenon.

425 *See* REDISH, *supra* note 7, at 90-94, 102. The adequacy of an individual injury to establish standing is implicit in Marshall's emphasis on the maxim that every harm to a legal right must have a remedy. *See Marbury*, 5 U.S. (1 Cranch) at 162-69. Although Marshall was focusing on statutory and common law rights, this remedial imperative seems equally applicable to rights derived from the Constitution.

426 Causation arguably promotes separation of powers after the New Deal. As modern regulations have such a broad scope, requiring a plaintiff to show that the government's action has *directly* harmed her forecloses a huge pool of potential claimants and prevents federal courts from becoming permanent monitors of executive conduct. *See* Poisner, *supra* note 14, at 346-48; *see also* Logan, *supra* note 14, at 44-46, 73-77 (maintaining that causation serves separation of powers by preventing advisory opinions). Unfortunately, proof of causation is nearly impossible in complex regulatory schemes. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1458, 1463-69 (1988) [hereinafter Sunstein, *Privatization*]; *see also* VINING, *supra* note 313, at 32, 45, 51, 85-86, 89, 93-94, 101, 113, 139-43 (Causation analysis ignores "the Donne effect"—*i.e.*, that all events are interdependent.).

Furthermore, the "causation" determination depends on how the Court characterizes the injury, and is thus subject to similar manipulation. *See* Nichol, *Rethinking*, *supra* note 412, at 79-82. Indeed, causation is an even more nebulous concept than injury, as any first-year torts student knows. *See* Chayes, *supra* note 379, at 19.

427 *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751-61 (1984).

428 *See, e.g.*, *Marbury*, 5 U.S. (1 Cranch) at 162-69. Moreover, because the modern Court treats standing as a threshold determination based on the pleadings, it is improper at that stage to ascertain redressability—the last item a court considers after all the facts and arguments have been presented. *See, e.g.*, ERWIN CHEMERINKSY, FEDERAL JURISDICTION 76 (1994); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 7, 74-75 (1984). I do agree, however, that judicial remedies must not exceed "judicial" bounds and should not interfere unnecessarily with legislative and executive functioning. *See* Pushaw, *supra* note 36, at 525 n.365.

c. *Standing and Separation of Powers: A Neo-Federalist Synthesis*

Under a Neo-Federalist approach, standing would be granted whenever a statute or the Constitution authorizes a plaintiff to sue, unless a federal court would thereby be required to render legal advice or to issue an order that could be revised by the political branches. Somewhat different separation-of-powers principles apply, however, depending on whether a claim is based on a violation of a statute or the Constitution.[429]

i. *Alleged Statutory Violations*

Separation of powers nearly always demands judicial deference to Congress's exercise of its Article I powers to enact general laws reflecting the majority's policy preferences and to determine how the rights

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429 Other commentators have distinguished between statutory and constitutional claims. *See, e.g.*, Fletcher, *supra* note 308, at 223-24, 250-51, 280; Logan, *supra* note 14, at 40-42, 48-82.

Professor Stearns has argued that standing furthers separation of powers by preserving the core distinction in constitutional structure between judicial and legislative lawmaking. *See* Stearns, *Historical*, *supra* note 310; Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995) [hereinafter Stearns, *Standing*].

Stearns's thesis can be summarized as follows. Standing doctrine reduces the ability of interest-group litigants to control the sequence of case presentation—a matter of utmost importance because *stare decisis* makes the evolution of legal doctrine dependent upon the order of decisions. Stearns, *Standing*, *supra*, at 1314-15, 1318, 1350-67, 1377, 1381-85, 1392. By ensuring that a case's path hinges on fortuitous events beyond the parties' control rather than litigant manipulation or judicial preference, standing appropriately limits federal court lawmaking to *ad hoc* occasions where a seriously harmed individual presents a case that must be decided. *Id.* at 1316, 1319-20, 1351, 1359-62, 1375-78, 1382, 1389, 1392, 1396-1403, 1405, 1411. Standing correspondingly preserves Congress's fundamental legislative power to create—or to decline to create—law whenever and however it sees fit, limited only by minimal constitutional restrictions. *Id.* at 1316, 1319, 1357-59, 1361-64, 1377-1401. In fact, the Court has always rejected ideological litigants to reinforce the basic separation-of-powers principle that Congress, but not the federal judiciary, has the power to control the timing and scope of lawmaking. *Id.* at 1402-03. This desire to maintain the distinction between legislation and adjudication explains why standing, which developed to prevent attacks on the regulatory programs that emerged in the New Deal and mushroomed in the Great Society, has been retained by the Burger and Rehnquist Courts despite their distrust of government regulation. *Id.* at 1322-23, 1327-29, 1367, 1395 n.269, 1402-04. Indeed, those conservative Courts have expanded standing doctrine to avoid making substantive decisions whose outcome could not be reasonably predicted because of the Justices' fragmentation into liberal, conservative, and moderate camps—in contrast to the New Deal and Warren Courts, which shared a common doctrinal foundation on most constitutional issues. *See* Stearns, *Historical*, *supra* note 310, at 352-67, 375-85, 460-61.

Although I cannot respond fully here to Professor Stearns's pathbreaking scholarship, I note that he discounts the relevance of originalist historical analysis (*see* Stearns, *Standing*, *supra*, at 1327-28 n.69) and, not surprisingly, assumes that standing properly furthers the majoritarian norm embodied in American government. *See* Stearns, *Standing*, *supra*, at 1402, 1406, 1411; Stearns, *Historical*, *supra* note 310, at 337. Examination of Federalist-era materials reveals, however, significant antimajoritarian aspects of the Constitution that have been distorted in the twentieth century. *See supra* part II.A.

it has created can be vindicated most effectively.[430] For example, Congress may entrust protection of statutory rights almost entirely to an executive agency, so long as the statute (1) sets forth intelligible standards to guide the exercise of administrative discretion;[431] and (2) provides judicial review at least for those whose constitutional or common law rights are directly affected by the agency's action.[432] To promote efficiency, the Court has presumed that Congress does not intend to grant standing generally to challenge an agency's administration of its governing statute. For instance, nobody can question the IRS's application of the Tax Code to Leona Helmsley except her.[433]

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430 Thus, two Article I powers are implicated. The first is the core "legislative power" to enact statutes, which is limited only by Article I's enumeration of powers—a virtually meaningless restriction today. *See supra* notes 299-307 and accompanying text. Second, Congress's control over federal jurisdiction enables it to determine the level of judicial review necessary to vindicate the federal law it creates. *See supra* notes 108, 179 and accompanying text.

Because congressional grants of standing to remedy statutory "injuries" represent the simultaneous exercise of two broad Article I powers, separation of powers dictates extraordinary judicial deference. *See, e.g.*, Fallon, *supra* note 428, at 52-59; Logan, *supra* note 14, at 59-64, 69-70, 77, 81; Nichol, *Justice Scalia*, *supra* note 389, at 1157, 1160; *see also* 3 DAVIS & PIERCE, *supra* note 161, at 19-21, 47-63 (In the administrative law context, congressional intent should be the basis for resolving standing issues). Indeed, some scholars have argued that standing should be treated as a substantive question of whether Congress has created a cause of action for a plaintiff to remedy the violation of a statutory injury. *See, e.g.*, Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974); Fletcher, *supra* note 308, at 223-24, 229, 242-43, 253-65; Sunstein, *Lujan*, *supra* note 389, at 166-67, 170-71, 177-78, 185, 190-91, 205-09, 211, 222-23, 229, 235-36.

This section merely outlines standing to allege executive branch statutory violations. Particularly detailed and insightful commentary on this topic has been provided by two scholars. First, Cass Sunstein has contended that the Court has resurrected substantive due process by granting standing to objects of regulation (usually powerful firms) to protect their common law rights, while usually denying standing to regulatory beneficiaries seeking to assert public rights. Sunstein, *Lujan*, *supra* note 389, at 164-65, 181-97, 211-13, 216-20.

Second, Joseph Vining has argued that the traditional standing inquiry, which focuses on the past deprivation of a private property right, should not be applied to administrative law because (1) the remedy sought is usually prospective and is requested before property rights have crystallized; and (2) judicial review of agency decisionmaking necessarily involves a direct balancing of public values. *See* VINING, *supra* note 313, at 67-77, 81, 89-90, 98-99, 129-30, 164-71. Vining builds upon LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 459-545 (1965).

431 *See generally supra* notes 303, 306 and accompanying text (discussing non-delegation doctrine).

432 *See* Monaghan, *Marbury*, *supra* note 380, at 18-20. This minimum due process requirement finds expression in the Administrative Procedure Act, 5 U.S.C. § 702 (1982), with a few narrow exceptions, *id.* §§701(a)(1) & (2). *See* Fallon, *Article III*, *supra* note 380, at 979-82 (objecting that even these exceptions offend Article III values by allowing Congress to preclude judicial review of federal law questions). Other statutes can add to the APA's floor. *See* Sunstein, *Lujan*, *supra* note 389, at 181-82.

433 *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (holding that plaintiffs lacked standing to challenge an IRS ruling that pertained not to them but to nonprofit hospitals). Similarly, in Allen v. Wright, 468 U.S. 737 (1984), the Court would

Conversely, Congress may grant broader judicial review through public actions such as prerogative writs, relator and informer proceedings, or citizen suits. Until recently, the Court properly deemed such explicit legislative authorization sufficient to overcome its prudential reluctance to infer widespread standing.[434] *Lujan*, however, invalidated a citizen-suit provision on the ground that Article III prohibits judicial cognizance of generally shared legal injuries[435]—despite overwhelming evidence that public actions were part of the Anglo-American tradition incorporated into the Constitution and have been authorized since the beginning of the Republic.[436]

Moreover, the Court's familiar rationale—the need to preserve the judiciary's limited role vis-a-vis the elected branches[437]—is Orwellian, for it engaged in activist constitutional interpretation to strike down an act of Congress approved by the President. By asserting sole discretion to determine standing based on "limits" that appear nowhere in Article III's text, structure, or history, the Court usurped Congress's power to determine who can vindicate statutory rights judicially.[438] Had the Court applied Neo-Federalist principles, it would have honored the statutory grant of standing, for doing so would not

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have been justified in denying standing if plaintiffs had complained that the IRS misapplied the Tax Code to another taxpayer (*i.e.*, private schools), for such a suit would have "challeng[ed], not specifically identifiable Government violations of law, but the particular program agencies establish to carry out their legal obligations." *Id.* at 759. However, those plaintiffs were claiming that the IRS had harmed them by violating specific statutory and constitutional limits on its enforcement discretion (namely, prohibitions against discrimination). *Id.* at 792-95 (Stevens, J., dissenting).

434 *See supra* notes 382-85, 390-97 and accompanying text. Indeed, even that champion of judicial restraint, Justice Frankfurter, recognized this principle. *See supra* note 313 and accompanying text.

435 Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-76 (1992).

436 *See supra* notes 33, 37-38, 153, 197 and accompanying text; *see also* Sunstein, *Lujan*, *supra* note 389, at 166-67, 171-79, 214.

437 *Lujan*, 504 U.S. at 559-60, 573-78.

438 *See supra* notes 108, 179. As the dissent argued, Congress has the power to impose procedural limits on the discretion it gives the Executive in attaining substantive statutory goals and to authorize courts to enforce those limits through citizen suits: "Just as Congress does not violate separation of powers by structuring the procedural manner in which the Executive shall carry out the laws, surely the federal courts do not violate separation of powers when, at the very instruction and command of Congress, they enforce those procedures." 504 U.S. at 604 (Blackmun, J., dissenting); *see generally id.* at 589-90, 601-04 (detailing this argument).

Scholars have noted the irony of Justice Scalia's invocation of judicial restraint and separation of powers to justify a decision that increased judicial power and contracted Congress's authority to make judicially enforceable policy choices. *See, e.g.*, Nichol, *Justice Scalia*, *supra* note 389, at 1142-47, 1151-53, 1157-58, 1160, 1162, 1168-69; Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife: *Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1170-71, 1187-88, 1198-1201 (1993); Sunstein, *Lujan*, *supra* note 389, at 166-67, 211, 214, 217-20, 236. Before *Lujan*, commentators had warned that dicta in prior cases might lead to such an unwarranted outcome. *See, e.g.*, Fletcher, *supra* note 308, at 231-34; Nichol, *Injury*, *supra* note 374, at 1940-41.

have forced it to render an opinion that was advisory or politically revisable.

The *Lujan* Court also stressed the separation-of-powers goal of minimizing judicial interference with the President's exercise of Article II power to execute the law:

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."[439]

The Take Care Clause, however, does not grant the President power, but rather imposes a duty to carry out the law as written.[440] Indeed, its purpose was to foreclose the President from claiming that his "executive power" includes the right to violate or suspend a statute[441]—the sort of total discretion Justice Scalia apparently endorses.[442] Thus, judicial review legitimately stops the President from sabotaging the legislature's policy choices.[443]

The Court's response is that, if the President breaches his duty to faithfully execute the law, the appropriate remedy is congressional (not judicial) oversight.[444] For example, in *Allen* the Court cautioned that allowing standing "would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary."[445] The availability of legislative scrutiny, however, does not necessarily

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439 *Lujan*, 504 U.S. at 577 (citing U.S. CONST. art. II, § 3). *But see id.* at 601-04 (Blackmun, J., dissenting) (Congress's authorization of judicial actions to enforce limitations on executive discretion merely strengthens statutory mandates.). The Court first invoked this "Take Care Clause" rationale in Allen v. Wright, 468 U.S. 737, 761 (1984).

Article III standing doctrine gradually has incorporated Article II concerns as the number of cases involving agency action has risen and the Court's separation-of-powers philosophy increasingly has stressed deference to the executive. *See* Sunstein, *Lujan*, *supra* note 389, at 194-96, 211-14, 217-18; Sunstein, *Privatization*, *supra* note 426, at 1459-61, 1470-71.

440 *See Allen*, 468 U.S. at 792-95 (Stevens, J., dissenting); Sunstein, *Privatization*, *supra* note 426, at 1471.

441 *See supra* note 110 and accompanying text.

442 *See* Scalia, *supra* note 6, at 897 ("The ability to lose or misdirect laws can be said to be one of the prime engines of social change. . . ."). The President's undoubted discretion in enforcing often vague statutory language simply does not apply where Congress's directive is clear. *See* Sunstein, *Lujan*, *supra* note 389, at 218.

443 *See, e.g.*, Sunstein, *Privatization*, *supra* note 426, at 1471-72; *see also* Sunstein, *Lujan*, *supra* note 389, at 212-13, 217-18, 231-33 (arguing that judicial review over alleged executive statutory violations would be nonexistent if the Take Care Clause barred standing to raise such claims).

444 *See, e.g.*, *Lujan*, 504 U.S. at 577.

445 *Allen*, 468 U.S. at 760 (citation omitted).

preclude judicial review—especially in a case like *Allen*, where the plaintiffs were questioning the legality (not the "wisdom and soundness") of IRS tax breaks to discriminatory private schools.[446]

Neo-Federalism supports legislative monitoring of the executive not only through committees and funding decisions but also by authorizing judicial actions. By 1787, Parliament had long provided such double protection, and the Federalists—who endorsed checking even more emphatically—likely intended this practice to continue.[447] Moreover, this dual security against executive misconduct has become even more important in this century as the locus of government power (and the greatest threat of tyranny) has shifted from Congress to the executive.[448] Indeed, the immensity of the bureaucracy has made it impossible for the legislature alone to police the executive.[449]

In sum, separation of powers warrants judicial deference to Congress's determinations concerning standing to vindicate statutory rights, and the exercise of all jurisdiction granted will not invade the President's Article II power.

ii. *Constitutional Challenges to Political Branch Actions*

Where a plaintiff alleges a constitutional violation, the usual Neo-Federalist bans on advisory opinions and politically revisable judicial orders still apply.[450] However, an additional rule should be followed: At least one person must have standing to bring a claim under every constitutional provision. According to Federalist theory, the People established a written Constitution to identify clearly the limits on each department, and neither Congress nor the President can impartially

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446 *See id.* at 792-95 (Stevens, J., dissenting).

447 *See supra* note 52 and accompanying text (discussing historical parliamentary oversight of the executive); *supra* notes 33, 38 and accompanying text (describing Parliament's authorization of prerogative writs and other public actions to check the executive). *See generally supra* part I.B.2 (detailing Federalists' commitment to checks and balances).

A contrary inference might be drawn from the Framers' decision to allow the People to hold the Chief Executive accountable through elections, thereby lessening the need for the legislative or judicial oversight that existed in England. *See supra* notes 134-35 and accompanying text; GWYN, MEANING, *supra* note 21, at 126-27. However, the First Congress thought otherwise, because it directly monitored executive conduct and authorized public judicial actions against the executive. *See* supra notes 153, 197 and accompanying text; *see also* Casper, *supra* note 72 (analyzing interaction between the First Congress and President Washington).

448 *See supra* notes 298-300, 375-79 and accompanying text; *see also* Sunstein, *Constitutionalism*, *supra* note 298, at 463-85 (endorsing increased congressional and judicial scrutiny of agency actions).

449 The slow, cumbersome, and erratic process of legislative oversight exacerbates this problem. *See, e.g.*, Poisner, *supra* note 14, at 377-78.

450 These requirements are minimal but not meaningless. In several cases, the Court has erroneously granted standing when Congress effectively sought judicial advice on abstract constitutional questions. *See* Fletcher, *supra* note 308, at 280-90 (citing Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976); Buckley v. Valeo, 424 U.S. 1 (1976)).

interpret restrictions on their own authority. Hence, judicial review alone can check the political branches from exceeding their constitutional bounds and threatening liberty.

These Federalist separation-of-powers principles have been incorporated into standing doctrine only partially. The Court has construed its jurisdiction over "all Cases arising under the Constitution"[451] to authorize standing for those who can show a particularized constitutional injury. The Court also has adopted the prudential rule that a suit can be brought only by the person harmed, not by third parties claiming injury based on mere awareness of the government's unconstitutional action.[452]

Restricting standing to injured individuals makes sense when the plaintiff alleges invasion of an individual constitutional right—for example, Article I's ban on *ex post facto* laws and bills of attainder; most of the Bill of Rights;[453] the Reconstruction Amendments; and the Nineteenth, Twenty-fourth, and Twenty-fifth Amendments.[454] Furthermore, this approach nicely balances competing separation-of-powers goals. On the one hand, it protects liberty by allowing the person whose constitutional freedom has been infringed to sue—or to decide not to sue.[455] As long as one individual can enforce such constitutional provisions, they retain vitality, and the government will be deterred from disregarding them. On the other hand, the Court promotes efficiency by insulating the government's conduct from attack by paternalistic busybodies.[456]

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451 U.S. CONST. art. III, § 2; 28 U.S.C. § 1331 (1988).

452 *See, e.g.*, Whitmore v. Arkansas, 495 U.S. 149 (1990) (holding that a prisoner lacked standing to challenge a death penalty sentence imposed on a fellow inmate). The Court has recognized certain exceptions, most importantly for claimants who are closely related to the injured party. *See, e.g.*, Singleton v. Wulff, 428 U.S. 106, 117-18 (1976) (ruling that doctors may assert the abortion rights of their patients). *See generally* Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984) (questioning the Court's exercise of discretion to determine that certain plaintiffs can act as private attorneys general in raising constitutional issues affecting third parties); Robert A. Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CAL. L. REV. 1308 (1982) (contending that one party should never be allowed to assert another's constitutional rights).

453 Possible exceptions are the First Amendment's Establishment Clause and the Ninth and Tenth Amendments.

454 *See* Eric J. Segall, *Standing Between the Court and the Commentators: A Necessity Rationale for Public Actions*, 54 U. PITT. L. REV. 351, 391-94, 398 (1993). Applying a private law injury model to the Constitution is especially apt where the provision at issue has common law roots, such as a claim under the Takings Clause, U.S. CONST. amend. V, or the Contracts Clause, U.S. CONST. art. I, § 10, cl. 1.

455 *See* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 306-10 (1979) (suggesting that in order to protect personal autonomy, courts should prevent meddlers from asserting the individual rights of others who choose not to litigate).

456 Others have made similar arguments, although not from the standpoint of balancing separation-of-powers concerns. *See, e.g., id.*; Fletcher, *supra* note 308, at 279; Segall, *supra* note 454, at 391-94. Arguably, the entire Constitution reflects the People's collective

The Court has also applied its particularized-injury requirement to determine standing under constitutional provisions that either protect collective rights (*e.g.*, the Establishment Clause) or structure the government (*e.g.*, most of Articles I and II).[457] Because violations of such provisions ordinarily cannot produce a distinct injury, however, the Court has effectively made them judicially unenforceable and meaningless as limits on power.[458] Moreover, the argument that only Congress can authorize general standing to enforce non-individualistic constitutional provisions[459] undermines Federalist principles. It assumes that the political branches have sovereign power to

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judgment, and therefore any violation of it injures all citizens. Indeed, the Court has recognized the puhlic's interest in the enforcement of certain constitutional rights usually perceived as individualistic. *See* Doernberg, *supra* note 25, at 102-09 (citing cases involving the First, Second, Fourth, Sixth and Thirteenth Amendments). Nonetheless, allowing suit only by those personally harmed by the government's misconduct should suffice to protect these broader societal interests. *See id.* at 110-12.

457 *See supra* part II.B.1.a.

458 Professor Doernberg has argued that standing should be granted to private attorneys-general to vindicate the public interest in governmental compliance with constitutional provisions that cannot produce individualized injuries. *See* Doernberg, *supra* note 25, at 110-18. Such broad standing would recognize that the Constitution incorporated the Lockean idea that certain rights are held collectively by the body politic. *Id.* at 56-68, 95-118; *see also supra* note 25 (discussing Locke). Other scholars have developed this thesis. *See, e.g.*, REDISH, *supra* note 7, at 95-97, 103; Eric B. Schnurer, Note, *"More Than an Intuition, Less Than a Theory": Toward a Coherent Doctrine of Standing*, 86 COLUM. L. REV. 564, 585-93 (1986); Segall, *supra* note 454, at 375-77, 380-82, 391-403; Dana S. Treister, Comment, *Standing to Sue the Government: Are Separation of Powers Principles Really Being Served?*, 67 S. CAL. L. REV. 689, 709-10, 712-13 (1994). A related argument is that standing should depend on the meaning of a particular constitutional provision, which should be seen as the source of the legal duty and the definition of those entitled to enforce it. *See* Fletcher, *supra* note 308, at 223-24, 229, 239, 251, 265-90; Winter, *supra* note 33, at 1463-81, 1496-97, 1503, 1508-09.

I have previously suggested that standing doctrine should be reoriented to acknowledge that the judiciary's primary function in constitutional cases is to interpret the Constitution, not to resolve private disputes involving injured plaintiffs. *See* Pushaw, *supra* note 36. Others have relied on a similar adjudicatory model to argue that standing should be granted to almost anyone who alleges a constitutional violation. *See, e.g.*, Bandes, *supra* note 290, at 281-304. Although I continue to believe that such a public law conception of judicial review is accurate, I underestimated the utility of the personal injury requirement as applied to claimed violations of individual constitutional rights.

459 This contention was first made by Justice Harlan in Flast v. Cohen, 392 U.S. 83, 130-33 (1968) (Harlan, J., dissenting). It makes sense if one accepts Congress's absolute control over federal jurisdiction. *See, e.g.*, Logan, *supra* note 14, at 54-59, 62-63; Monaghan, *Adjudication*, *supra* note 223, at 1375-76 (endorsing Harlan's position on the ground that the Constitution's scheme of separated powers requires express political branch authorization before courts can decide constitutional cases).

By contrast, I think Congress's admittedly substantial power over federal jurisdiction is limited by Article III's command that federal courts "shall" decide "all" constitutional cases and by deeper structural constitutional principles. *See* Amar, *Neo-Federalist*, *supra* note 13, at 229-52; *see also* Gene R. Nichol, Jr., *Standing on the Constitution: The Supreme Court and* Valley Forge, 61 N.C. L. REV. 798, 840 (1983) [hereinafter Nichol, *Valley Forge*] (attacking Justice Harlan for adopting an overly cautious approach to separation of powers that renders collective constitutional rights judicially unenforceable solely because they are shared).

preclude judicial review over much of the People's Constitution and can be trusted to respect the limits that charter places on their authority. It also subverts the Federalist theory that the Constitution's structure is the primary protector of individual liberty.[460]

The better approach would be for the Court to interpret its federal question jurisdiction as including grants of standing to enforce constitutional provisions that benefit citizens generally.[461] One example would be those that directly guarantee shared civil liberties, such as the Establishment Clause.[462] Another would be structural provisions that limit governmental power, most obviously those that directly embody separation-of-powers values. For instance, Article I, Section 6 bars members of Congress from holding office in another branch or from being appointed to an executive or judicial office that has been created or granted increased compensation during their legislative tenure.[463] These prohibitions, designed to prevent congressional conflicts of interest, cannot safely be left to Congress's

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460 *See, e.g.*, CHEMERINKSY, *supra* note 428, at 68-69, 96-97; Redish & Cisar, *supra* note 106, at 452, 493. This focus on structure helps explain the original absence of a Bill of Rights. *See id.*; *see also supra* note 145.

461 In addition, the Court should strike down attempts to curb such jurisdiction. *See supra* notes 370-74, 458-60 and accompanying text.

On the modern Court, only Justice Douglas consistently linked the need for broad standing to the idea of a written Constitution based on popular sovereignty and separation of powers. *See, e.g.*, United States v. Richardson, 418 U.S. 166, 197-202 (1974) (Douglas, J., dissenting); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 229-35 (1974) (Douglas, J., dissenting). He stressed the federal courts' "indispensable" role in "protect[ing] the individual against prohibited conduct by the other two branches of the Federal Government," which they should not "abdicat[e]" by "clos[ing] their doors." Flast v. Cohen, 392 U.S. 83, 110-11 (1968) (Douglas, J., concurring); *see also id.* at 109-14 (urging liberal standing for taxpayers as "private attorneys general" to claim constitutional violations).

Unfortunately, Justice Douglas's theory has largely been ignored, probably for two reasons. First, he never set forth an elaborate historical defense of his position. Second, like much of his writing, Douglas's standing opinions were often either careless or unorthodox. *See, e.g.*, Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970) (inadvertently creating a confusing "injury-in-fact" test for standing); Sierra Club v. Morton, 405 U.S. 727, 741-49 (1972) (Douglas, J., dissenting) (suggesting that trees should have standing).

462 All taxpayers should be granted standing to allege that the government's assistance to religion violates the Establishment Clause, because the whole polity shares this "injury." *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 490-513 (1982) (Brennan, J., dissenting); Nichol, *Valley Forge*, *supra* note 459, at 798-803, 845-48; *see also supra* notes 396-97 and accompanying text (discussing *Valley Forge*).

By contrast, other Establishment Clause claims (*e.g.*, that a Sunday-closing law discriminates against religions with a Saturday sabbath) may be characterized as involving more individualistic harms and thus may be subjected to conventional standing analysis. For a discussion of various types of Establishment Clause standing, see Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 585-88, 628-30 (1995).

463 U.S. CONST. art. I, § 6, cl. 7; *see supra* note 124 and accompanying text.

discretion. Yet that is exactly what the Court has held—with the Kafkaesque rationale that separation of powers compels this result![464]

The proposed approach would impede government functioning only to the extent that the Constitution mandates the "inefficiency" of compliance with its provisions.[465] Moreover, after granting standing, courts can employ two other doctrines to address efficiency concerns. First, ripeness can be applied to postpone decision on premature constitutional challenges.[466] Second, the presumption that the entire Constitution is judicially enforceable can be rebutted by evidence that a particular provision involves a political question—*i.e.*, grants exclusive authority to Congress or the President without imposing any justiciable restriction on its exercise.[467]

Although it may seem unimportant whether a dismissal is based on standing or political question grounds, it makes a great difference under constitutional theory. In refusing to grant standing for generalized claims, the Court has stated that the political branches can disobey the Constitution with impunity—a repudiation of the rule of law. By contrast, declining to decide a political question upholds the Constitution's assignment of certain issues to a political official's sole discretion; any action she takes is "legal" by definition.

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464 *See, e.g.*, *Ex parte* Levitt, 302 U.S. 633 (1937) (per curiam) (denying a citizen standing to claim that Hugo Black was ineligible to serve as a Justice because as a Senator he had voted to increase the emoluments of federal judges); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (rejecting an attempt by a public-interest group to invoke the Incompatibility Clause to challenge members of Congress who were simultaneously serving in the military reserves, an executive branch agency). Both *Levitt* and *Schlesinger* rested on the separation-of-powers rationale that an individual injury is required to challenge political branch actions. *See supra* notes 385, 393-95 and accompanying text.

Dean Nichol has argued that the judiciary's limited role justifies a presumption against its hearing generalized constitutional claims, rebuttable on a showing that either an interest expressly reserved to the citizenry or the proper functioning of the political process is at stake. Nichol, *Injury*, *supra* note 374, at 1943-44. In his view, neither *Levitt* nor *Schlesinger* involved such concerns, whereas *Richardson* did. *Id.* at 1943-45.

465 Looser standing rules would broaden court access, but not necessarily to an overwhelming extent. *See, e.g.*, CHEMERINSKY, *supra* note 428, at 55.

466 *See infra* part II.B.3.

467 *See infra* part II.B.4; *see also* 3 DAVIS & PIERCE, *supra* note 161, at 2-4, 24, 27-30, 39-40, 47, 75, 94-95 (urging the Court to recognize candidly that certain constitutional provisions are nonjusticiable, rather than making such determinations *sub rosa* in its standing analysis); Nichol, *Rethinking*, *supra* note 412, at 88, 93, 98-102 (arguing that the political question doctrine is more appropriate than standing for evaluating separation-of-powers concerns). Thus, unlike standing's injury requirement, the political question doctrine can distinguish structural provisions that are judicially enforceable from those that are not. For example, United States v. Richardson, 418 U.S. 166 (1974), might properly have been disposed of on political question grounds. *See id.* at 178 n.11 (noting that the Framers apparently recognized that the Statement and Accounts Clause, U.S. CONST. art. I, § 9, cl. 7, allowed some secrecy in foreign affairs spending, as confirmed by two centuries of practice); *see also* Casper, *supra* note 72, at 252, 257-58 (showing that the First Congress and all its successors have made money available for foreign relations and given the President discretion not to account for expenditures that he felt should not be made public).

In sum, Neo-Federalist principles suggest that the Court may legitimately apply its personalized-injury requirement to determine standing under constitutional provisions that protect individual—but not collective—rights.

2. *Mootness and Separation of Powers*

Like its standing jurisprudence, the Court's mootness doctrine posits that Article III limits the judiciary to resolving live controversies between parties with individual rights at stake.[468] Therefore, to decide a case after the litigants' dispute has ended would be to render a forbidden "advisory opinion" with no real-world effect.[469]

Until 1964, however, the Court treated mootness not as an Article III requirement but as an equitable determination.[470] Indeed, it has long decided several types of moot cases—for example, those "capable of repetition, yet evading review."[471] These exceptions are incomprehensible if federal courts lack Article III jurisdiction to resolve moot cases at all.[472] Thus, mootness is, and always has been, a matter of discretion.

One major factor guiding the exercise of that discretion should be separation of powers. Unfortunately, the Court has mentioned this principle in only one mootness case, *United States Parole Commission v. Geraghty*.[473] Geraghty, a federal prisoner, brought a class action challenging the constitutionality of the parole guidelines. The district court denied his petition for class certification and rejected his constitutional claims.[474] Although Geraghty was subsequently released and

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468 Instead of developing a distinct constitutional rationale for mootness, the Court has simply incorporated its standing analysis. *See infra* note 476 and accompanying text.

469 *See* Church of Scientology v. United States, 506 U.S. 9, 12 (1992). Unlike a true "advisory opinion," however, a litigated case that becomes moot on appeal presents a factual and legal record that has been fully developed by adverse parties. *See* Monaghan, *Adjudication*, *supra* note 223, at 1384.

The following discussion will be limited to mootness on appeal to the Supreme Court; different considerations may apply to cases that become moot at earlier stages.

470 The Court first asserted that mootness was based on Article III in Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964).

471 *See* Honig v. Doe, 484 U.S. 305, 330-31 (1988) (Rehnquist, C.J., concurring). Another exception applies where a defendant has ceased but might later resume the challenged conduct. *Id.* *See* CHEMERINSKY, *supra* note 428, at 128-42 (describing these and other exceptions).

472 *See Honig*, 484 U.S. at 330 (Rehnquist, C.J., concurring). The Court has adopted an odd compromise, insisting that mootness is an Article III command yet recognizing its "flexible character." *See* United States Parole Comm'n v. Geraghty, 445 U.S. 388, 395-97, 400 (1980). However, if the Court has no constitutional power to decide a moot case, then that requirement cannot be applied flexibly. *See id.* at 410-13 (Powell, J., dissenting).

473 445 U.S. 388 (1980).

474 *Id.* at 392-93.

thus did not need parole, the Court nevertheless held that the expiration of his substantive claim did not moot the class action.[475]

The Court recited that all justiciability doctrines serve two purposes. First, they confine judicial power to disputes where a plaintiff has a personal stake in the outcome, thereby ensuring that the issues are sharply presented by adversaries.[476] The Court ruled that Geraghty had retained such a personal interest in obtaining class certification.[477] Second, justiciability promotes separation of powers by avoiding judicial intrusion into areas committed to the political branches.[478] The Court tersely concluded that separation concerns would have been implicated if the *legal issues* presented (*i.e.*, the validity of the parole guidelines) had become moot, but were not relevant because those questions remained live and the sole determination was whether the plaintiff was a proper *party*.[479] The Court's unpersuasive issue-party distinction[480] masked an obvious reason for its cursory treatment of separation of powers: The Court ignored its stated goal of avoiding interference with the coordinate branches by straining to overcome the mootness hurdle so it could review executive action. Similar contradictions pervade mootness cases involving the federal government.[481]

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475 *Id.* at 395-408.

476 *Id.* at 395-97. The Court relied on standing cases like Flast v. Cohen, 392 U.S. 83, 95, 100-01 (1968), and Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216-18 (1974).

477 *Geraghty*, 445 U.S. at 401-04.

478 *Id.* at 395-96.

479 *Id.* at 396 (citing *Flast*, 392 U.S. at 95, 100-01).

480 *Geraghty*'s resurrection of *Flast*'s contrast between issues and parties was remarkable, given that by 1980 the Court had rejected that distinction in the standing context because it recognized the impossibility of separating the issue from the party presenting it. *See supra* note 387; *see also Geraghty*, 445 U.S. at 412-13 (Powell, J., dissenting) (arguing that the Article III personal stake requirement, whether in the standing or mootness context, furthers the same purpose of limiting the Court's role in a democratic society).

481 Often the Court ignores mootness problems and confronts a coequal branch. For example, in Powell v. McCormack, 395 U.S. 486 (1969), the House of Representatives exercised its Article I power over its membership by refusing to seat Powell. While his case was pending, Powell was elected to the next Congress and seated. The Court held that the case was not moot, *id.* at 495-500, and that the House had violated the Constitution. *Id.* at 489, 501-12, 550; *see also* Church of Scientology v. United States, 506 U.S. 9, 12-13 (1992) (reversing the Ninth Circuit's dismissal on mootness grounds of a church's constitutional attack against the IRS).

Conversely, the Court sometimes finds cases moot to avoid political entanglements. *See, e.g.*, Burke v. Barnes, 479 U.S. 361 (1987) (ruling that a challenge to the President's "pocket veto" of a bill was moot because the bill had expired by the time of the appeal); Department of Treasury v. Galioto, 477 U.S. 556 (1986) (concluding that Congress's amendment of statutory provisions previously found unconstitutional by a lower federal court mooted the appeal).

Finally, the Court sometimes decides seemingly moot cases in order to vindicate governmental interests. For example, United States v. Villamonte, 462 U.S. 579 (1983), rejected a Fourth Amendment challenge to Customs Officers' boarding of a vessel without

The Court could clarify mootness by developing a Neo-Federalist approach that explicitly balances various separation-of-powers factors, some of which it has acknowledged implicitly. For example, *Geraghty* alluded to the wisdom of not disturbing the political branches.[482] This efficiency concern counsels against deciding a moot case to avoid the possibility of an adverse—and unnecessary—judgment against a coordinate branch.[483] If the government assumes this risk by consenting to suit, however, the Court ordinarily should proceed in recognition of the efficiency interests of conserving judicial resources[484] and enforcing federal law.[485]

Efficiency, however, may conflict with other separation-of-powers goals. Most importantly, federal courts must check the government's violations of the law. Indeed, the "capable of repetition" exception serves this purpose by ensuring that allegedly illegal government actions do not escape judicial scrutiny.[486] This concern with checking and with maintaining the rule of law applies with special force when the case involves a constitntional rather than statutory claim.[487] Finally, the Court should consider the liberty interests of both the plain-

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probable cause and seizing drugs later used as evidence to convict the defendants. This case appeared moot, however, because the government had voluntarily dismissed its criminal prosecution after the Court of Appeals reversed the convictions. *See id.* at 593-98 (Brennan, J., dissenting); *see also* United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 202-04 (1968) (rejecting mootness arguments and upholding the government's antitrust suit).

482 *Geraghty*, 445 U.S. at 396.

483 The Court always has discretion to dismiss a moot case, and one factor it should consider is the desirability of avoiding *needless* intervention into political branch affairs. By contrast, Neo-Federalism treats standing as mandatory: Federal courts must recognize standing when Congress has constitutionally conferred it, even though exercising jurisdiction may interfere with the political departments. *See supra* notes 429-65 and accompanying text.

484 If a case becomes moot pending appeal and presents a question that will certainly recur, dismissal would squander resources already expended and require further wasteful litigation. *See* Honig v. Doe, 484 U.S. 305, 331-32 (1988) (Rehnquist, C.J., concurring).

485 This concern underlies one of the exceptions to mootness. *See* United States v. W.T. Grant Co., 345 U.S. 629 (1953) (holding that the defendants' voluntary termination of a practice that allegedly violated the antitrust laws did not render the case moot because they were free to return to this practice).

486 *See supra* note 471 and accompanying text; *see also* Evan T. Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 628, 631, 655-56 (1992) (asserting that exceptions to mootness reflect the Court's recognition of its role in articulating public values).

487 *See, e.g.*, Corey C. Watson, Comment, *Mootness and the Constitution*, 86 Nw. U. L. REV. 143, 171-74 (1991). As with standing, mootness determinations in purely statutory cases should turn on legislative intent. *See supra* notes 430-49 and accompanying text. For example, the Court should dismiss moot cases if Congress sought to minimize judicial challenges to agency administration of statutes. Conversely, judgment should be rendered if important statutory goals would otherwise be frustrated. *See, e.g.*, *Honig*, 484 U.S. at 317-23 (deciding a moot case under the "capable of repetition" exception involving a disabled student who alleged that a school had violated his federal statutory rights).

tiff (who should not be forced to continue)[488] and non-parties (whose freedom may be threatened by the government's conduct, even though the plaintiff's liberty is no longer endangered).

These separation-of-powers factors—the government's efficiency concern of avoiding an adverse judgment without its consent, the Court's checking role, and society's interest in safeguarding liberty—must be weighed on a case-by-case basis. Nonetheless, certain fixed rules ordinarily should apply in the four situations that may arise. First, if both parties want a moot case decided, rendering judgment would promote efficiency, checking, and liberty.[489] Second, if neither side wishes to continue, the case should be dismissed because protecting the plaintiff's autonomy and governmental efficiency will usually outweigh the need for checking. Third, if the government seeks a decision but the other party objects, the Court may decide the case on both efficiency and checking grounds, but should consider whether it can make a decision without ordering the other party to proceed (*e.g.*, because the case has already been briefed) and whether general liberty interests are at stake. Finally, if the private party—but not the government—requests adjudication, efficiency concerns favoring dismissal may be overriden by compelling checking and liberty interests.

Geraghty fits into the last category. The government claimed mootness, but the plaintiff alleged a serious constitutional violation, he chose to continue, and other prisoners' liberty was being threatened in the most basic sense. Thus, the result in *Geraghty* might be defensible in separation-of-powers terms. Those principles, however, should have been considered explicitly in *Geraghty* and in all other mootness cases.

3. *Ripeness and Separation of Powers*

Ripeness differs from other justiciability doctrines in two ways. First, whereas mootness, lack of standing, or a political question precludes judicial review, ripeness merely postpones a decision until the factual and legal issues have matured. Second, while the former doctrines have historical antecedents, ripeness is a twentieth-century creation. Despite its novelty, the Court's ripeness analysis relies heavily on its historical understanding of separation of powers, and thus suffers from familiar defects that can be rectified by applying Neo-Federalist principles.

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488 This autonomy interest resembles that of plaintiffs who have standing because they have suffered a constitutional injury but decline to file suit. *See supra* notes 455-56 and accompanying text.

489 If the judicial resolution would also affect third parties, a court should allow their participation and consider their interests.

a. *The Historical Development of Ripeness*

The Declaratory Judgment Act of 1934 ("DJA") authorized federal courts to interpret laws that had not yet been applied, so long as a plaintiff could show an "actual controversy" with a defendant who was threatening enforcement.[490] The DJA's purpose was to spare citizens the Hobson's choice of either (1) complying with an allegedly unconstitutional statute (or a regulation contrary to statute), or (2) violating the law and facing severe consequences if it were upheld.[491]

After finding the DJA constitutional in 1937,[492] the Court developed the ripeness doctrine to determine when to issue declaratory relief. For example, in *United Public Workers v. Mitchell*,[493] federal employees attacked the First Amendment validity of the Hatch Act, which prohibited them from political campaigning. The Court held that, because the law had not actually been applied to the plaintiffs, they faced merely a "hypothetical threat" and were seeking "advisory opinions" prohibited by Article III.[494] The Court declared:

> The Constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches. Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination. . . . When the courts act continually within these constitutionally imposed boundaries of their power, their ability to perform their function as a balance for the people's protection against abuse of power by other branches of government remains unimpaired. Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories. Such abuse of judicial power would prop-

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490 48 Stat. 955 (1934) (codified at 28 U.S.C. §§ 2201-2202 (1982)).

491 *See* S. REP. No. 1005, 73rd Cong., 2d Sess. 2-3 (1934). The explosion of regulatory laws in the early 20th century increased the frequency of such a choice.

492 Aetna Life Ins. v. Haworth, 300 U.S. 227 (1937) (holding that the "actual controversy" requirement saved the Act's constitutionality). The constitutional legitimacy of state declaratory judgment acts had been questioned in Willing v. Chicago Auditorium Ass'n, 277 U.S. 274, 289 (1928), but was later upheld in Nashville, C. & St. Louis Ry. v. Wallace, 288 U.S. 249 (1933).

The availability of declaratory judgments also has implications for mootness. For example, if the legal rights of plaintiffs have actually been violated, they should be permitted to obtain a declaratory judgment to that effect even if their case has become moot and they have suffered no monetary harm. *See* Akhil R. Amar, *Law Story*, 102 HARV. L. REV. 688, 718-19 n.157 (1989). *Cf. supra* part II.B.2 (arguing that compelling checking and liberty interests may warrant deciding a moot case even if the government objects).

493 330 U.S. 75 (1947).

494 *Id.* at 89-90 (citing Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792), and the *Correspondence of the Justices*, 3 JAY PAPERS, *supra* note 20, at 486). The Court also relied on the prudential tradition of avoiding unnecessary decision of constitutional questions. 300 U.S. at 90 n.22.

> erly meet rebuke and restriction from other branches. By these mutual checks and balances by and between the branches of government, democracy undertakes to preserve the liberties of the people from excessive concentrations of authority. . . .[495]

Justice Frankfurter joined the *Mitchell* opinion and reaffirmed its reasoning in subsequent cases.[496]

Mitchell and its progeny dealt with constitutional challenges. When a plaintiff attacked agency action on statutory grounds, however, the Court downplayed its Article III rhetoric and admitted that ripeness was a discretionary determination based on separation of powers.[497] The leading case is *Abbott Laboratories v. Gardner*,[498] in which drug companies challenged a federal agency's interpretation of the Food, Drug, and Cosmetics Act to require them to change all their printed matter to disclose generic drug names.[499] Initially, the Court explained:

> The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy "ripe" for judicial resolution . . . . [Ripeness's] basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements

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495 *Id.* at 90-91.

496 For example, in International Longshoremen's and Warehousemen's Union, Local 37 v. Boyd, 347 U.S. 222 (1954), resident aliens who wished to work seasonally in the Alaska territory requested declaratory and injunctive remedies against INS officials who had threatened to prevent their return to the United States. Without such relief, the workers could pursue employment only at the risk of "los[ing] the home this country once afforded them." *Id.* at 226 (Black, J., dissenting). Nevertheless, Justice Frankfurter, writing for the Court, found this claim unripe: "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *Id.* at 224 (citing *Mitchell*, 330 U.S. at 75). *But see* Kenneth C. Davis, *Ripeness of Governmental Action for Judicial Review*, 68 HARV. L. REV. 1122, 1123-34 (1955) (rejecting the Court's assertion that Article III prohibited federal courts from resolving debilitating legal uncertainties).

Mitchell and its progeny raised troubling separation-of-powers questions because the Court disregarded the will of Congress, which had authorized declaratory judgments precisely to enable people to avoid having to violate a law—and risk severe consequences—in order to challenge it.

497 For example, in Public Serv. Comm'n v. Wycoff, 344 U.S. 237 (1952), a company requested declaratory relief against a Utah commission that was interfering with its transportation over routes authorized by the Interstate Commerce Commission. The Court held that the matter had not yet ripened into a final form that would permit it to understand the legal issues clearly. *Id.* at 241-46. The Court repeatedly acknowledged the discretionary nature of its determination. *See, e.g., id.* at 241, 243, 245. It emphasized the separation-of-powers concern that the plaintiff was attempting to obtain a premature federal court declaration on legal questions committed for initial decision to the ICC. *Id.* at 246-47.

498 387 U.S. 136 (1967).

499 *Id.* at 137-39 (citing relevant statutes and regulations).

> over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.[500]

Applying this balancing test, the Court found ripe the claim that the regulation exceeded the agency's statutory authority.[501]

Abbott's characterization of ripeness as a discretionary inquiry into prematurity, rather than an Article III jurisdictional limitation, was gradually extended from statutory challenges to those based on the Constitution.[502] In the late 1970s, however, the Court recast ripeness as an Article III requirement and correspondingly shifted its focus to a standing-like search for an "injury."[503] Despite abandoning *Abbott*'s reasoning, however, the Court has continued to apply its balancing test. The result has been analytical incoherence.[504]

b. *A Neo-Federalist Approach to Ripeness*

The Court's treatment of ripeness as an Article III jurisdictional matter ignores the clear constitutional and statutory power of federal courts to decide federal question cases in the form of declaratory and injunctive actions.[505] Rather, ripeness doctrine should determine

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500 *Id.* at 148-49.

501 *Id.* at 148-56. First, the Court held that the issues were appropriate for judicial resolution because a purely legal question of statutory construction had been presented. *Id.* at 149. Second, it concluded that withholding review would force the companies either to comply with the regulation and incur huge costs or to iguore the law and risk severe penalties—the very type of dilemma the DJA sought to avoid. *Id.* at 152-54.

502 *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 117 (1976) (Politicians' constitutional challenge to future determinations by the Federal Election Commission "is a question of ripeness, rather than lack of case or controversy under Art. III."); *see also id.* at 114 (emphasizing the "distinction between jurisdictional limitations imposed by Art. III and '[p]roblems of prematurity and abstractness' that may prevent adjudication").

503 *See* Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 162-64 (1987) [hereinafter Nichol, *Ripeness*] (citing cases).

504 For example, Reno v. Catholic Social Servs., 509 U.S. 43 (1993), involved a challenge by illegal aliens to INS regulations that drastically restricted access to an amnesty program authorized by Congress. The majority conflated *Abbott* with Article III principles and held the case unripe. *Id.* at 57-61. Three dissenters argued persuasively that the case was ripe under *Abbott* because the regulations immediately and severely affected the aliens' ability to obtain amnesty, and the legal issues were fit for decision. *Id.* at 77-85 (Stevens, J., dissenting); *cf. id.* at 67-77 (O'Connor, J., concurring in judgment) (also disagreeing with the majority's holding of unripeness); *see also* Nichol, *Ripeness*, *supra* note 503, at 155-56, 167-85 (contending that ripeness should not be an Article III requirement, but rather a discretionary judicial evaluation of the legal claim in light of the policy of avoiding early adjudication).

505 *See* U.S. CONST. art. III, § 2 (empowering the judiciary to decide federal questions); 28 U.S.C. § 1331 (1982) (same); 28 U.S.C. § 2201 (1982) (authorizing declaratory judgments). The constitutionality of declaratory judgments has not been questioned since they were upheld 60 years ago. *See supra* note 492.

whether that jurisdiction ought to be exercised in a specific case after a discretionary weighing of many factors,[506] most importantly separation of powers.

The Court itself devised such an approach in *Abbott*, which provides a framework for reformulating ripeness along Neo-Federalist lines. First, the *Abbott* Court recognized that judicial relief ordinarily should not be granted too soon out of deference to (1) Congress's power to commit issues to an agency for initial determination; and (2) the executive's authority to administer regulatory laws until a final order has been issued.[507] Such efficiency concerns create a presumption against pre-enforcement review that can be overcome if the plaintiff shows "the hardship . . . of withholding court consideration."[508] This "hardship" test captures the DJA's purpose of protecting individual liberty and allows the judiciary to check unlawful political branch conduct.[509]

In short, the suggested methodology acknowledges that ripeness is an inherently discretionary doctrine and focuses directly on balancing the Federalist separation-of-powers principles of efficiency, liberty, and checking.

4. *Political Questions and Separation of Powers*

Federal courts decline jurisdiction over cases involving questions that the Constitution entrusts for final resolution to Congress or the President. This "political question doctrine" has always been based on "separation of powers," but those two concepts mean far different things to the modern Court than they did to the Framers. This divergence is odd, because Federalists spoke with singular clarity about political questions and their relationship to the structural Constitution. Recovering this understanding helps to elucidate a muddled doctrine.

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506 Such a test befits the equitable nature of the relief sought. *See Abbott*, 387 U.S. at 148. Indeed, ripeness is inherently discretionary: Determining whether a claim has developed sufficiently is obviously a question of degree.

507 *See id.* at 148; *see also* Public Serv. Comm'n v. Wycoff, 344 U.S. 237, 246-47 (1952) ("Responsibility for effective functioning of the administrative process cannot be . . . transferred from the bodies in which Congress has placed it to the courts.").

508 *See Abbott*, 387 U.S. at 149. If no irreparable harm will result from delaying a decision, forbearance is justified—indeed, it might obviate the need for any judicial resolution. *See generally* CHEMERINSKY, *supra* note 428, at 116-23 (discussing this "hardship" test).

If a plaintiff is about to suffer serious harm and her claim is ripe, it should not matter whether her challenge is based on the Constitution or a statute, despite the Court's contrary statements. *See supra* notes 493-504 and accompanying text.

509 *See supra* note 491 and accompanying text. Of course, such checking can occur only through the proper exercise of judicial power—as reflected in the *Abbott* standard focusing on the "fitness of the issues for judicial decision." 387 U.S. at 149. Such fitness depends on the completeness of the factual and legal record and the importance of facts to a particular decision. *See, e.g.*, CHEMERINSKY, *supra* note 428, at 123-25 (citing cases).

a. *The Political Question Doctrine: A Summary*

The modern doctrine was established in *Baker v. Carr*,[510] which held justiciable a claim by Tennessee voters that a statute violated the Equal Protection Clause by malapportioning legislative representation to favor rural areas.[511] The Court characterized the political question doctrine as a "case-by-case inquiry" based entirely on separation of powers,[512] as measured by the following criteria:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[513]

The Court concluded that the Equal Protection Clause provided "judicially manageable standards" and that the other five listed factors were not relevant because the case concerned state officials, not a coequal federal branch.[514] In the latter situation, the Court indicated that one criterion would be the most significant and sensitive: "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government . . . is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."[515]

The Court has followed *Baker* for thirty-four years in construing the text and history of various constitutional clauses alleged to raise political questions. Fourteen such matters have been found justiciable. Most involved Article I—for example, provisions granting Con-

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510 369 U.S. 186 (1962).

511 *Id.* at 208-37.

512 *Id.* at 210-11; *see also id.* at 210 ("[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government . . . which gives rise to the 'political question.' . . . The nonjusticiability of a political question is primarily a function of the separation of powers.").

513 *Id.* at 217; *see also id.* (Each of these factors illustrates that "a political question [is] . . . essentially a function of the separation of powers.").

514 *Id.* at 226. Justice Frankfurter, however, could discern no principles in the Equal Protection Clause to guide judicial review of state apportionment decisions. *Id.* at 300-01 (Frankfurter, J., dissenting). He accused the majority of "rewrit[ing] the Constitution," *id.* at 300, which nowhere requires states to base representation solely on population. *Id.* at 301-24 (citing sources).

515 *Id.* at 211.

gress power to enact statutes,[516] apportion congressional districts,[517] and judge its members' qualifications.[518] Other decisions rejected assertions of exclusive Article II power, most notably President Nixon's claim of an absolute privilege to refuse to disclose confidential communications to executive officers.[519]

Only two questions have been deemed "political." First, in *Gilligan v. Morgan*,[520] the Court ruled that the Constitution left military training and procedures entirely to the elected branches, and accordingly dismissed a complaint by Kent State students that the killing of protestors had resulted from the government's negligent training of the National Guard.[521] Second, *Nixon v. United States*[522] held nonjusticiable a federal judge's claim that the Senate had violated its Article I impeachment power by convicting him based on the report of a factfinding committee.[523]

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516 *See, e.g.*, United States v. Munoz-Flores, 495 U.S. 385, 389-96 (1990) (allowing a claim that a federal criminal statute violated Article I, § 7, cl. 1, which provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives"); INS v. Chadha, 462 U.S. 919, 940-43 (1983) (holding that the Court has power to interpret Article I, §§ 1 & 7, which require that both Houses concur in all legislation and that every bill be presented to the President); *id.* at 944-49 (declaring that a statute authorizing either House to veto an executive decision violated Article I requirements of bicameralism and presentment, which further separation of powers).

517 One case permitted a challenge to Congress's selection of a method for apportionment of congressional districts among states under Article I, § 2. Department of Commerce v. Montana, 503 U.S. 442, 456-59 (1992). All the others involved state districting decisions that affected federal legislative elections. *See, e.g.*, Wesberry v. Sanders, 376 U.S. 1, 5-7 (1964) (concluding that Article I, § 4, which empowers Congress to determine "[t]he Times, Places, and Manner" of congressional elections, does not grant it exclusive authority to protect the right to vote); Reynolds v. Sims, 377 U.S. 533, 582 (1964) (ruling that Congress's admission into the Union of states with apportionment plans not based on population, and its implicit judgment that such states had a Republican Form of Government, does not bar the Court from determining whether such schemes violate the Equal Protection Clause); *see also* Davis v. Bandemer, 478 U.S. 109, 118-27 (1986) (A claim of gerrymandering does not raise a political question.).

518 *See* Powell v. McCormack, 395 U.S. 486, 512-49 (1969) (rejecting the argument that Article I, § 5 created a political question). The Court has also held that Congress's exercise of its vast power over Indian affairs, U.S. CONST. art. I, § 8, cl. 3, can be reviewed if it allegedly infringes individual constitutional rights. *See* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83-84 (1977); *see also* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 248-50 (1985).

519 United States v. Nixon, 418 U.S. 683, 692-97 (1974); *see also* Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 229-30 (1986) (permitting a challenge to the Secretary of Commerce's exercise of statutory authority to decline to certify Japan for allegedly violating an international treaty on the ground that a purely legal question of statutory interpretation had been presented, albeit one touching foreign relations). In several other cases, the Court has rejected political question arguments with little discussion.

520 413 U.S. 1 (1973).

521 *Id.* at 5-12 (citing U.S. CONST. art. I, § 8, cl. 16).

522 506 U.S. 224 (1993).

523 *Id.* at 226-38. Judge Nixon alleged that Article I, Section 3, Clause 6, which provides that "the Senate shall have the sole Power to try all Impeachments," requires a trial-type procedure before the full Senate. *Id.* at 226-28. *See infra* note 556 (analyzing *Nixon*).

b. *Defects of the Current Doctrine*

While *Baker*'s six criteria are purportedly based on separation of powers, they do not express Federalist separation principles—or any other standards that might usefully distinguish political questions from justiciable matters.[524] For example, because *any* exercise of judicial power against the political branches upsets "a political decision already made," shows a "lack of respect," and holds "the potentiality of embarrassment,"[525] those three *Baker* factors are hard to reconcile with the Federalist institution of judicial review.[526] Similarly, a "lack of judicially discoverable and manageable standards"[527] seemingly exists in many constitutional clauses, not merely those triggering political questions.[528]

Finally, judicial review would cease if "a textually demonstrable constitutional commitment of the issue to a coordinate political department" creates a political question,[529] for Articles I and II demon-

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524 *See* CHEMERINSKY, *supra* note 428, at 144-45 (deeming *Baker* factors "useless" in making this distinction); Mulhern, *supra* note 307, at 163 (to similar effect).

525 *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

526 The Court itself recently rejected the government's "lack of respect" argument on similar grounds. *See* United States v. Munoz-Flores, 495 U.S. 385, 389-91 (1990). It did not explain, however, why it persisted in even considering this "Rodney Dangerfield" factor.

527 *See Baker*, 369 U.S. at 217; *see also* BICKEL, *supra* note 5, at 184 (contending that the Court cannot develop workable principles from certain constitutional provisions).

528 The Court has given detailed content to many generally worded constitutional provisions. *See, e.g., Nixon*, 506 U.S. at 247 (White, J., concurring) (observing that the Senate's power to "try" impeachments was no less judicially manageable than other constitutional terms like "due process"); REDISH, *supra* note 7, at 122-26, 135. If the *Baker* Court can discover in the Equal Protection Clause sufficiently manageable standards to resolve an issue as complex and diffuse as state apportionment, one wonders whether this criterion imposes any real limits.

Similarly unhelpful is "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Again, *Baker* appeared to involve just such a policy question, and the Court did not tell us which other such determinations would "clearly" be left to the political branches.

529 *Baker*, 369 U.S. at 217. Here the Court adopted a methodology similar to that suggested by Professor Wechsler, who had previously argued that the political question doctrine requires courts "to judge whether the Constitution bas committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation." Wechsler, *supra note* 142, at 7-8.

Unfortunately, *Baker* and its progeny abandoned Wechsler's underlying rationale: that jurisdiction can be declined only if the "political question" is based on the Constitution because judicial review itself is rooted in the Constitution. *Id.* at 2-10. Wechsler stressed that where all jurisdictional and procedural requirements had been met, courts had the duty to decide constitutional cases, even though the action under review involved "political" value choices. *Id.* at 6, 9, 15-16, 19. However, courts had to act "judicially," basing their judgments and reasoning on neutral and general principles that transcended the immediate result. *Id.* at 15-16, 19. Judicial restraint demanded that the political branches' value choices control, absent such an adequate and principled constitutional basis to overturn their actions. *Id.* at 15, 19, 25. Thus, Wechsler rejected pure result-oriented constitutional decisionmaking and the use of federal courts solely to police and advise the political branches. *Id.* at 6, 11-12.

strably commit all legislative and executive powers to Congress and the President. Rather, the real issue is whether a constitutional question must be left to a political branch for a *final, non-reviewable decision.*[530] And that determination cannot be based on the Constitution's text, which nowhere states that any particular exercise of legislative or executive power is or is not judicially reviewable.[531] Therefore, interpretation must focus primarily not on the Constitution's language, but instead on its structure, political theory, history, and precedent.

Unfortunately, the Court has misunderstood Federalist political ideas and has frequently manufactured dubious history.[532] Moreover, even when the Justices have provided credible historical analyses, they have been limited to a particular constitutional provision.[533] The Court has never set forth a broad theory that relates political questions to Federalist principles of judicial review and separation of powers.

c. *A Critique of Political Question Scholarship*

Although commentators generally have assailed the political question doctrine, their suggested cures are often worse than the disease. Professor Bickel, for example, urged the Court to manipulate the political question doctrine to avoid constitutional decisions that might cause confrontation with the elected branches and weaken judi-

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By applying a classic Wechslerian approach divorced from its underlying justification, the Court has made the political question doctrine incoherent. *Cf.* Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643 (1989) (arguing that if the Court ever frankly acknowledged that its modern constitutional decisions are based on political considerations rather than legal principles, the scope of the political question doctrine would widen greatly because such policy issues should be left to the elected branches).

530 *See Nixon*, 506 U.S. at 240 (White, J., concurring).

531 *See id.*; REDISH, *supra* note 7, at 115-19, 135; Scharpf, *supra* note 166, at 541. As the Constitution does not contain a specific "judicial review" clause, it obviously does not mention which of its provisions are subject to this power. Admittedly, however, certain constitutional language provides valuable evidence that the Framers did not intend judicial oversight of specific political actions such as impeachments. *See supra* note 166.

532 For instance, the Court relied on erroneous views of American history in holding that claims under Article IV, Section 4 (guaranteeing each state a Republican Form of Government) and Article V (regulating the amendment process) always raise political questions. *See supra* note 289 and *infra* note 575 (analyzing Guarantee Clause); *supra* notes 262-64, 320-23 and accompanying text (discussing constitutional amendments).

533 For example, while the *Nixon* Court provided a solid textual and historical analysis of the Impeachment Trial Clause, U.S. CONST. art. I, § 3, cl. 6, it did not relate this clause to other constitutional language and Federalist structural principles that confirm its conclusion that the Senate's impeachment judgments cannot be reviewed judicially. *See infra* note 556.

cial legitimacy.[534] This idea, recently endorsed by Justice Souter,[535] destroys Federalist political theory by granting judges absolute discretion to decline to exercise judicial power.[536]

Dean Choper has recommended that the judiciary abstain from cases involving the Constitution's structure (*e.g.*, separation of powers) and instead conserve its resources for protecting individual rights.[537] This theory resembles Justice Scalia's approach to standing and should be rejected on similar grounds: The Constitution's structure preserves liberty every bit as much as its provisions guaranteeing individual rights.[538]

In contrast to Choper, Professor Redish has argued that federal courts must hear all cases involving alleged constitutional violations by the majoritarian branches and that therefore the political question doctrine should be repudiated.[539] However, Redish acknowledges that courts should accord deference to the political departments in rendering decisions on the merits, especially where the Constitution grants Congress or the President power but does not specify how it must be exercised (*e.g.*, foreign affairs).[540] Redish's proposal, which

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534 BICKEL, *supra* note 5, at 183-85, 188.

535 *See Nixon*, 506 U.S. at 253 (Souter, J., concurring) (relying on Bickel in characterizing the political question doctrine as a prudential determination focusing on the respect owed to the political branches and the urgency of providing a judicial answer); *id.* (deeming judicial review unwise because the Senate had sensibly exercised its broad discretion over the impeachment process and because intervention might embarrass the Senate and disrupt the government, but arguing that judicial scrutiny might be necessary if impeachment procedures threatened the integrity of the results).

536 *See supra* notes 361-63 and accompanying text.

537 JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980).

538 *See supra* notes 457-60 and accompanying text; *see also* CHEMERINSKY, INTERPRETING, *supra* note 7, at 100-01 (Choper's thesis is inconsistent with a written Constitution that protects separation of powers.).

539 *See* REDISH, *supra* note 7, at 111-36. Like Redish, Professor Chemerinsky has contended that the political question doctrine conflicts with the Court's role as authoritative interpreter of the whole Constitution. CHEMERINSKY, INTERPRETING, *supra* note 7, at 97-104. However, he recoguizes a few narrow exceptions (*e.g.*, for presidential vetoes and appointments). *Id.* at 110-11; *see also* Erwin Chemerinsky, Book Review, *The Seduction of Deduction: The Allure of and Problems with a Deductive Approach to Federal Court Jurisdiction*, 86 NW. U. L. REV. 96, 110-11 (1991) (suggesting that the Justices might be too self-interested to review a constitutional amendment process designed to overturn a specific Court decision); *cf.* Wayne McCormack, *The Political Question Doctrine—Jurisprudentially*, 70 U. DET. L. REV. 793 (1993) [hereinafter McCormack, *Political Question*] (characterizing the doctrine as a myth, because a judicial decision that a constitutional provision is nonjusticiable is itself an act of judicial review that interprets the Constitution as providing no judicially enforceable law constraining the President or Congress); Albert, *Justiciability*, *supra* note 290, at 1161-72 (to similar effect).

540 REDISH, *supra* note 7, at 116-17; *see also id.* at 124-27 (distingnisbing total "procedural" deference to any political decision from substantive deference to a political branch's expertise or its need to determine the meaning of a constitutional provision). Redish stresses that, even where the original Constitution vested unrestricted power in a political department, later amendments might have limited the exercise of such authority. *Id.* at 118-19; *see also* CHEMERINSKY, INTERPRETING, *supra* note 7, at 102-04 (urging judicial defer-

garnered the implicit support of Justices White and Blackmun,[541] reflects a sophisticated vision of American political theory. Ultimately, however, this view cannot be reconciled with clear Federalist statements that certain constitutional questions were beyond the scope of judicial competence.[542]

d. *A Neo-Federalist Approach to Political Questions*

A Neo-Federalist approach builds upon *The Federalist No. 78* and *Marbury*.[543] The Hamilton-Marshall argument for judicial review is well known,[544] as is their rule-of-law justification: Only the judiciary can impartially determine whether the elected branches have complied with constitutional limits on their authority.[545] Almost completely overlooked, however, is Hamilton's recognition that, even though judicial review reflects the "natural presumption" that the political branches cannot be "the constitutional judges of their own powers," this presumption can be rebutted by the Constitution itself.[546]

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ence, not abdication, when the President or Congress has acted within an area of their special competence).

541 In their last opinion on the subject, Justices White and Blackmun treated the political question doctrine as a matter of constitutional interpretation and reached the merits, but applied a deferential standard of review in concluding that the Senate's procedures complied with the Impeachment Trial Clause. *Nixon*, 506 U.S. at 239-52 (White, J., concurring).

542 *See infra* part II.B.4.d (citing sources). Other major articles include Louis Henkin, *Is There A "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976) (arguing that the Court has no distinct political question doctrine, but rather either (1) concludes on the merits that a government official's action was within constitutional bounds, or (2) disposes of claims by exercising its traditional equitable discretion in light of many factors, including separation of powers); Mulhern, *supra* note 307 (contending that the doctrine properly divides responsibility for constitutional interpretation between courts and the majoritarian branches); Scharpf, *supra* note 166 (asserting that the political question doctrine should acknowledge the functional limits of the judicial process that make adjudication of certain cases too difficult).

543 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

544 Both argued that judges must decide cases by expounding the law; that the Constitution is the People's supreme law; and that therefore the Constitution must control over a clearly repugnant legislative act. *See* THE FEDERALIST No. 78, at 524-26 (Hamilton); *Marbury*, 5 U.S. (1 Cranch) at 176-79; *supra* notes 141-49, 251-53 and accompanying text.

545 *See Marbury*, 5 U.S. (1 Cranch) at 177-78; THE FEDERALIST No. 78, at 523-28 (Hamilton).

546 If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not collected from any particular provisions in the constitution.

THE FEDERALIST No. 78, at 524-25 (Hamilton). *See supra* note 148 (examining the meaning of this excerpt). I have discovered only seven citations to this passage and no real analysis of it. Most relevant is Professor Redish's quotation of these words, accompanied by his remark that Hamilton "shift[ed] the burden of production" to those challenging the need for judicial review. REDISH, *supra* note 7, at 175 n.38. But Redish ignores Hamilton's evi-

Although Hamilton did not specify which provisions he had in mind, the *Marbury* Court identified the President's nomination of executive and judicial officers and his conduct of foreign affairs.[547] Chief Justice Marshall later added constitutional clauses concerning the militia and Congress's power to declare war.[548] Marshall plainly stated that such political questions were beyond the reach of judicial power, not merely that they were subject to a deferential standard of review.[549]

A Hamiltonian approach still makes sense today: The Constitution establishes a strong yet rebuttable presumption favoring judicial review. The areas in which the government can overcome this presumption (*i.e.*, political questions) invariably fall outside the classic paradigm of making, executing, and judging the law—the model that forms the basis of the coextensiveness principle underlying judicial review.[550] Recognizing political questions does not undermine popular sovereignty, the rule of law, or checks and balances, because the People decided that the need for efficiency was so great in certain instances that they gave political officials unrestrained power. Any exercise of such discretion is *ipso facto* "constitutional," and no one can claim otherwise in court.[551]

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dent meaning: When Congress or the President carries that burden, they *can* be the final judge of their own powers—a situation Redish believes is intolerable in our legal regime featuring judicial review. *Id.* at 111-36. Likewise, Professor McCormack contends that judicial review precludes any possibility of a political question doctrine, yet he too cites Hamilton's excerpt. McCormack, *Political Question*, *supra* note 539, at 799 n.21. Raoul Berger supports his similar argument for judicial review of the entire Constitution by quoting this passage, but he uses ellipses to delete the key language recognizing that this presumption can be rebutted. BERGER, *supra* note 52, at 116 n.62, discussed *supra* note 166. Finally, Professor Paulsen invokes Hamilton's words as evidence of the Framers' understanding that no coordinate branch has superior power to interpret the Constitution. Paulsen, *supra* note 175, at 249-50. *But see supra* note 175 (questioning this thesis).

547 *Marbury*, 5 U.S. (1 Cranch) at 166-67.

548 *See* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 28-32 (1827) (militia); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196-97 (1824) (declaration of war); *see also supra* notes 269-75 and accompanying text (discussing *Martin* and *Gibbons*).

549 *See, e.g.*, *Gibbons*, 22 U.S. (9 Wheat.) at 196-97 ("The wisdom and discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances . . . the sole restraints on which they [*i.e.*, the People] have relied, to secure them from abuse [of Article I powers]."); *Martin*, 25 U.S. (12 Wheat.) at 29-32 (Any judicial scrutiny of the President's judgment in calling forth the militia would interfere with his Article II powers.).

550 *See supra* part I. *Cf.* Chemerinsky, *Guarantee Clause*, *supra* note 323, at 851-53, 858-59 (recommending a strong presumption of justiciability for claimed violations of individual rights, rebuttable on a showing that a particular constitutional provision would be better interpreted and enforced by the political branches).

551 *See supra* notes 164-70 and accompanying text. This principle can be traced to Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), which held that the President's exercise of constitutional discretion is necessarily "legal" and thus cannot violate anybody's "rights," not that some violations of legal rights have no remedy. *See id.* at 158-71; *see also supra* note 236, 266-68 and accompanying text.

The most obvious political questions involve the Constitution's two pure checks. First, the President must have total discretion in deciding whether to veto a bill; giving the executive this specific share in the legislative power would be pointless if the judiciary could share it too.[552] Second, impeachments are inherently political and thus committed entirely to Congress.[553] More particularly, impeachment represents the Constitution's lone grant of "judicial power" to the legislature—an exception that would be unintelligible if courts could also participate in impeachments through the exercise of their ordinary judicial authority.[554] Furthermore, the core Anglo-American principle that judicial judgments must be final applies even where the tribunal (*e.g.*, the Senate) happens to be composed of legislators.[555] Thus, the Court reached the right result in *Nixon*, although it barely mentioned the dispositive separation-of-powers considerations.[556]

Of course, the Court may have to exercise judicial review to establish for the first time that a particular constitutional provision raises political questions. Thereafter, however, the issue becomes off-limits, except in a rare case in which the Court decides to reverse a prior decision. *See* Gerhardt, *supra* note 166, at 243-46 (arguing that the political question doctrine should not be abandoned as deceptive or confusing merely because the Court has to exercise judicial review to the limited extent of making a prelimiuary determination about whether an issue falls into an area in which courts cannot express an opinion about a political actor's conduct).

552 U.S. CONST. art. I, § 7, cl. 2. Congress must have the same unlimited power in determining whether to override the veto. Any judicial interference would upset the Constitution's delicate qualified-veto process. *See supra* note 165 and accompanying text; *see also* Paulsen, *supra* note 175, at 264-67 (agreeing that the President has plenary power over vetoes and pardons, despite contrary indications by courts). Moreover, because a legislative bill confers no legal rights, no suit can be allowed until the bill has become a statute.

553 *See supra* note 166 and accompanying text; *see also* Gerhardt, *supra* note 166, at 232-34, 252-76.

554 *See supra* note 166 and accompanying text.

555 *See generally supra* notes 45, 52-53, 166, 210 and accompanying text (describing the finality of court judgments).

556 The Court devoted much of its opinion to relatively trivial linguistic analysis, which yielded three conclusions. First, the Constitution committed "sole" (*i.e.*, exclusive) authority over impeachment trials to the Senate. Nixon v. United States, 506 U.S. 224, 230-31 (1993). Second, the word "try" did not afford a judicially manageable standard of review and did not necessarily require a judicial "trial" before the full Senate. *Id.* at 229-30. Third, the specificity of the other requirements in the Impeachment Trial Clause—that the Senate be under oath; that two-thirds of the Senators vote to convict; and that the Chief Justice preside when the President is tried—suggested that no additional limitations on the Senate proceeding were contemplated. *Id.* at 230. Unfortunately, the Court ignored many other constitutional provisions which indicate that impeachments are excluded from federal court jurisdiction. *See supra* note 166 (examining relevant language from Articles I, II, and III).

More persuasive was the Court's historical analysis, which demonstrated that the Framers had deliberately assigned the impeachment power to Congress—and correspondingly precluded judicial review—for four reasons. First, the Court was too small to bear this "awful discretion" and might lack the credibility to enforce a judgment overturning a legislative vote to convict. *See id.* at 233-34 (citing THE FEDERALIST No. 65 (Hamilton)). Second, judicial involvement would introduce the risk of bias that the Framers had sought to eliminate by separating the Senate impeachment trial of an official from his criminal trial in

The Constitution's drafters and ratifiers understood the nature of the venerable veto and impeachment checks, and in bestowing these powers assumed the risk of their abuse and relied solely on the political process to resolve any problems. Two centuries of practice has confirmed their practical and theoretical wisdom.[557] Therefore, the foolish or malicious use of such checks cannot justify judicial review.[558]

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court. *Id.* at 234. Third, the Founders made impeachments the only direct check on the judiciary, and courts would have a conflict of interest if they assumed final review over a constitutional process meant to regulate judges themselves. *Id.* at 234-35 (citing THE FEDERALIST Nos. 79, 81 (Hamilton)). Finally, the Framers provided safeguards against abuse of the impeachment power—for example, by dividing responsibility between the House and Senate and by requiring a super-majority vote to convict. *Id.* at 235-36. *See generally supra* notes 166-67 (buttressing these conclusions with further historical evidence).

The Court did not, however, appreciate that the third point reflected overriding rule-of-law concerns. Because "no man can be the judge in his own case," the Framers could not have intended to give Congress power over the impeachment and trial of judges, but to allow those same judges ultimately to determine impeachment standards or review convictions (or both). *See supra* notes 166-67. Moreover, although the Court correctly concluded that "the lack of finality and the difficulty of fashioning judicial relief counsel against justiciability," it focused solely on the prudential problem of disruption of governmental operations pending judicial review of an impeachment decision. *Nixon*, 506 U.S. at 236. The Court failed to grasp that the Senate's judgment was final because it was rendered as a "court" exercising "judicial power." *See supra* note 555 and accompanying text.

The overwhelming evidence from the Constitution's text, structure, and history refutes the argument that impeachment does not always present political questions—a claim made by several jurists and scholars. *See, e.g.*, *Nixon*, 506 U.S. at 239-52 (White & Blackmun, JJ., concurring); *id.* at 252-54 (Souter, J., concurring); BERGER, *supra* note 52, at 103-20; Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other* Nixon v. United States, 1993 SUP. CT. REV. 125.

557 *See* Gerhardt, *supra* note 166, at 232, 261.

558 Raoul Berger has argued that judicial review of impeachments should be available at least to ensure that Congress has not exceeded its jurisdiction (*e.g.*, by convicting an official for conduct that does not constitute "Treason, Bribery, or other high Crimes and Misdemeanors"), as opposed to second-guessing its substantive judgment about matters within its jurisdiction. BERGER, *supra* note 52, at 104-07, 111-14. This approach presents two problems. First, nothing in the Constitution's text, structure, or history authorizes even this restricted form of judicial review. *See supra* notes 166-67, 553-56 and accompanying text. Second, although certain jurisdictional issues seem clear-cut and amenable to judicial review (*e.g.*, whether the person impeached was a United States officer, U.S. CONST. art. II, § 4, or whether the Senate's punishment extended only to removal and disqualification from office, U.S. CONST. art. I, § 3, cl. 7, many jurisdictional questions cannot be resolved by courts without infringing on Congress's constitutional discretion. For example, if Congress impeached and convicted a Justice for usurping legislative power, the Supreme Court might vacate that judgment on the jurisdictional ground that the Justice's conduct did not amount to a "high Crime or Misdemeanor." However, the power to make precisely such a determination—whether labeled "jurisdictional" or "substantive"—falls within Congress's impeachment authority, as Federalists explicitly recognized. *See, e.g.*, THE FEDERALIST No. 81, at 546 (Hamilton).

Professor Berger also defends his approach as consistent with Powell v. McCormack, 395 U.S. 486 (1969). BERGER, *supra* note 52, at 104-08, 112, 119. *Powell* involved Article I, Section 5, Clause 1, which provides that "[e]ach House shall be the Judge of the . . . Qualifications of its own Members." The Court asserted jurisdiction on the ground that the case arose under the Constitution and held that Congress's power to judge its member-

Another class of political questions consists of those constitutional provisions that authorize the legislature to share in traditional executive prerogatives. For example, the President nominates executive officers and judges, but their appointment requires Senate advice and consent.[559] This process involves the exercise of political discretion before any legal rights have crystallized; hence, no one can sue over an appointment.[560]

Other joint executive-legislative powers implicate international relations. For instance, Congress can declare war and regulate the armed forces, but the President is Commander-in-Chief.[561] Similarly, the President makes treaties, but they become valid only with the advice, consent, and two-thirds concurrence of the Senate.[562] The Federalist Justices understood that the allocation of these shared discretionary powers to the elected branches implicitly excluded judi-

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ship was limited to the qualifications expressly set forth in Article I, Section 2, Clause 2 concerning age, citizenship, and residency. *Powell*, 395 U.S. at 512-50. Consequently, although the legislature's determination as to a constitutionally listed criterion might be final, the House had exceeded its power by adding qualifications and excluding Powell on that basis. *Id.* Berger argues that, just as Congress's exclusive power to judge its membership is limited by the Constitution's specification of three qualifications, so too Congress's sole power of impeachment is restricted to the three enumerated grounds of treason, bribery, and high crimes or misdemeanors. BERGER, *supra* note 52, at 104-07.

Professor Berger's analogy collapses, however, if *Powell* was wrongly decided—as the leading constitutional law scholar of that era believed. *See* Wechsler, *supra* note 142, at 8 (concluding that Congress's power over its membership and impeachment were the most obvious political questions). Most importantly, Article I's language that each chamber "shall" (*i.e.*, must) be the "judge" (not the preliminary arbiter) of its members' qualifications strongly suggests that federal courts should not question that judgment. Nonetheless, as there is no evidence that the Framers either endorsed or rejected judicial review of such legislative decisions, perhaps the presumption favoring review should apply and *Powell*'s holding should be accepted as correct. It does not necessarily follow, however, that impeachment should be treated similarly, for two reasons. First, impeachment is a check and thus has a unique status in our constitutional scheme. More specifically, it is a check *against federal judges*, which makes review by those judges problematic under the rule of law. *See supra* notes 166, 556. By contrast, that risk of bias does not arise when courts review Congress's power to determine its members' qualifications. Second, abundant historical evidence indicates that impeachment decisions are immune from federal court scrutiny. *See supra* notes 166-67, 553-56 and accompanying text.

559 U.S. CONST. art. II, § 2, cl. 2. *See supra* notes 168, 267 and accompanying text.

560 *See* CHEMERINSKY, INTERPRETING, *supra* note 7, at 102 (identifying appointments and vetoes as the only true discretionary political questions). For example, the President and the Senate can make considerations of race or gender dispositive in appointments, even though they would violate the Equal Protection Clause by enacting or executing a law that allocated benefits based solely on such factors. A person not appointed has no legal right to a judicial or executive office, and thus no basis for a lawsuit. The only judicially enforceable limit on the appointment power is the Ineligibility Clause, which protects citizens generally against members of Congress who have conflicts of interest from obtaining appointments. *See* U.S. CONST. art. I, § 6, cl. 7, discussed *supra* notes 124, 463-64 and accompanying text.

561 U.S. CONST. art. I, § 8 and art. II, § 2. *See supra* notes 169-70 and accompanying text.

562 U.S. CONST. art. II, § 2, cl. 2. *See supra* notes 169, 183 and accompanying text.

cial review, except in rare instances when the exercise of such powers clearly violated someone's vested legal rights.[563]

The Court has properly continued to find the *process* of making foreign and military policy to be nonjusticiable,[564] although it has recognized that the *results* of such decisions may sometimes be scrutinized if they invade individual rights, especially fundamental constitutional liberties.[565] For example, although the negotiation, rat-

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563 *See supra* notes 267-75 and accompanying text (citing early cases recognizing that military matters, foreign affairs, and appointments raise political questions). The necessity for legislative-executive coordination in such areas minimizes the likelihood of unconstitutional, unreasonable, or arbitrary action, thereby making judicial review less critical than in situations where the President or Congress acts alone (except for vetoes and impeachments).

564 For example, Gilligan v. Morgan, 413 U.S. 1 (1973), denied injunctive relief that would have required federal judges to oversee the actual training of soldiers. Even the *Baker* Court acknowledged that most foreign policy matters involve the exercise of discretion committed to the executive or legislative branches, require a unitary statement of the government's views, or concern legal standards that defy judicial application. Baker v. Carr, 369 U.S. 186, 211 (1962). One example is the declaration of war and the determination of when a war has begun or ended. *See id.* at 213-14. Another illustration is the President's unreviewable exercise of his Article II, Section 3 power to recognize foreign ministers and their governments. *See, e.g.*, Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918). *See generally* Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions . . . are delicate, complex, and involve large elements of prophecy. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility. . . .").

565 *See, e.g.*, Scharpf, *supra* note 166, at 583-85. Even when such basic rights are at stake, however, the Court has applied an extremely deferential standard of review, most notoriously in Korematsu v. United States, 323 U.S. 214 (1944) (allowing Japanese-Americans to bring a 14th Amendment challenge to their internment, but upholding the government's "military necessity" justification for this imprisonment). *See generally* Blumoff, *supra* note 145, at 230-34, 252, 259-60, 307-64 (arguing that federal courts should decide cases involving international relations only when doing so is absolutely necessary, either because important individual legal rights have been infringed or because the political departments have deadlocked on a question about the constitutional distribution of their powers).

When one political branch has allegedly usurped the other's constitutional prerogatives, granting standing to the affected government representative(s) and ruling on the merits might seem to be the most direct and orderly way to vindicate the Constitution. *See, e.g.*, Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215 (1985); Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve as a Counterweight?*, 54 U. PITT. L. REV. 63, 70-73, 103-20 (1992). Nonetheless, such disputes invariably raise issues that the Constitution does not clearly address and that the Founders left to the political process, with each department using its constitutional weapons to protect its interests and to force a compromise. *See* Blumoff, *supra* note 145, at 230-31, 307-22, 330-32, 350-58.

ification, and termination of treaties are political questions,[566] persons granted rights under treaties can vindicate them judicially.[567]

In contrast to checks and joint political branch authority over appointments and foreign relations, all other constitutional delegations of power carry a presumption of judicial reviewability that is very difficult to overcome. For instance, the Court has correctly allowed challenges to statutes allegedly enacted in contravention of Article I procedures.[568] Likewise, a claim that a purported constitutional amendment does not satisfy Article V should be justiciable. Because the Framers made the Constitution (including its amendments) the People's supreme law and designed the judiciary to vindicate that law against transient majoritarian sentiments, Congress should not have absolute control over amendments.[569] The contrary conclusion in *Coleman*[570] conflicts with Federalist theory, history, and precedent.[571]

Finally, certain constitutional clauses, although justiciable, should be interpreted with extraordinary deference to the political branches.[572] For example, the Constitution grants Congress near-total power over federal electoral matters[573] and imposes few limits on state apportionments, so the Court should uphold such political decisions unless they plainly violate constitutional rights (particularly freedom from racial discrimination).[574] Thus, the Court erred in *Baker*

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566 In Goldwater v. Carter, 444 U.S. 996 (1979), the Court appropriately dismissed a complaint by some Senators that the President cannot terminate a treaty without Senate consent. Four Justices concluded that this matter was a political question because it concerned Congress's power to negate the President's action in foreign affairs in an area where the Constitution is silent—treaty abrogation. *Id.* at 1002-06 (plurality opinion). Justice Powell deemed the case unripe because Congress had not yet taken any official action, and he urged the Court not to intervene until the legislature and executive had reached an impasse. *Id.* at 997-1002 (Powell, J., concurring); *see also* Blumoff, *supra* note 145, at 322-58 (endorsing Powell's approach).

567 Indeed, Article III included treaty jurisdiction, U.S. CONST. art. III, § 2, cl. 1, to rectify the flouting of such accords under the Articles of Confederation. *See* Carlos M. Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1097-1114 (1992); *see also supra* notes 81-82, 100, 169 and accompanying text.

568 *See supra* note 516 (citing cases).

569 *See supra* part I.B; *see also* CHEMERINSKY, INTERPRETING, *supra* note 7, at 103-04.

570 Coleman v. Miller, 307 U.S. 433 (1939).

571 *See supra* notes 262-64, 320-23 and accompanying text (citing sources).

572 *See supra* note 540 and accompanying text.

573 *See, e.g.*, U.S. CONST. art. I, § 4 (empowering Congress to "make or alter" state regulations concerning "[t]he Times, Places, and Manner" of congressional elections); U.S. CONST. art. I, § 2, cl. 3 (authorizing Congress to apportion House representation). Some scholars have argued that these provisions implicitly give Congress unreviewable power to draw election districts. *See, e.g.*, Wechsler, *supra* note 142, at 8-9.

574 Of course, noninterpretivists scoff at the notion of "clear" constitutional violations and instead endorse activist constitutional interpretation based on current social, moral, and political values. *See, e.g.*, MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982). By contrast, the Federalists believed that the very legitimacy of judicial review depended upon its application only in cases of unambiguous unconstitutionality. *See supra* notes 150, 155-57, 194, 211. More generally, the Framers understood

and its progeny not by exercising jurisdiction, but rather by construing the Equal Protection Clause as forbidding apportionment decisions based on innocuous factors such as geography.[575]

Overall, Neo-Federalism presumes that the power of judicial review should be exercised, absent persuasive evidence that the Consti-

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"judicial power" to mean the application of pre-existing rules to particular facts. *See supra* notes 112-13 and accompanying text. Although this original understanding cannot be recovered fully, it remains a useful ideal. *See, e.g.*, Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981) (defending constitutional interpretation based on text, structure, history, and precedent).

575 *See supra* notes 510-15, 517 and accompanying text (summarizing Baker v. Carr, 369 U.S. 186 (1962) and its progeny). Indeed, the Equal Protection Clause, which guards the rights of minorities and non-voting persons, seems generally inapplicable to state legislative districting, which concerns the political (voting) rights of majorities. Rather, apportionment really implicates Article IV, Section 4, which guarantees every state "a Republican Form of Government" (*i.e.*, one based on majority rule and popular sovereignty). *See* Akhil R. Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 753-54 (1994) [hereinafter Amar, *Central*].

The confusion of these two constitutional provisions originated in *Baker*. The *Baker* Court conceded that a challenge to apportionment based on the Guarantee Clause would be futile because of longstanding 20th century precedent dismissing as nonjusticiable all claims invoking that provision. *Baker*, 369 U.S. at 223-29. The Court avoided this case law by characterizing the matter as an Equal Protection complaint that individual voting rights had been impaired (*id.* at 226-27, 232)—a disingenuous "relabeling" of the Guarantee Clause claim. *Id.* at 267, 286-87, 297-300 (Frankfurter, J., dissenting); *see also id.* at 266, 277-80 (criticizing the majority for failing to reconcile its holding with cases that had specifically ruled apportionment to be a political question).

The *Baker* Court thereby sidestepped the key separation-of-powers issue: What is the appropriate role of eacb branch in ensuring states a Republican Form of Government? Although commentators have differed on the precise answer, they have agreed that the Constitution's text, structure, history, and precedent do not justify treating all Guarantee Clause challenges as political questions. *See, e.g.*, Symposium, *Ira C. Rothberger, Jr. Conference on Constitutional Law: Guaranteeing a Republican Form of Government*, 65 COLO. L. REV. 709 (1994) (setting forth arguments by Professors Amar, Chemerinsky, Merritt, and Weinberg that Guarantee Clause claims should be justiciable); *see also* New York v. United States, 505 U.S. 144, 184-85 (1992) (acknowledging the force of previous academic arguments making a similar point).

This scholarship supports a Neo-Federalist approach, which presumes that Article IV, Section 4 should be judicially reviewable. Indeed, that clause provides that "the United States" (whose government includes federal courts) shall guarantee every state a Republican Form of Government—not that "Congress" alone shall do so. *See* Bonfield, *supra* note 289, at 523. Moreover, the historical evidence does not indicate that Guarantee Clause issues are generally nonjusticiable. *See id.* at 513-65 (tracing the history of this clause and cases interpreting it). Thus, courts ordinarily should adjudicate complaints that a particular aspect of a state's government is incompatible with Article IV. *See, e.g.*, Chemerinsky, *Guarantee Clause*, *supra* note 323. However, the presumption favoring judicial review can be rebutted where Congress or the President has explicitly determined that one of several competing governments in a state is valid—the limited holding of Luther v. Borden, 48 U.S. (7 How.) 1 (1849), discussed *supra* note 289. The key issue in *Luther* was not whether Rhode Island's longstanding government was *republican*, but rather whether it was still a *government*—a question akin to the international law problem of recognition and thus committed to the political branches. *See* Amar, *Central*, *supra*, at 776.

tution's structure, political philosophy, history, and precedent make a question suitable for political resolution only.

5. *A Neo-Federalist Approach to Justiciability: A Summary*

The Court should abandon its current approach to justiciability, which rests on the mistaken idea that federal judges have a uniquely limited role in our constitutional government. Instead, the Court should adopt a Neo-Federalist methodology, which acknowledges the judiciary's coordinate function of adjudicating federal law cases to promote liberty, the rule of law, and checks and balances, yet also recognizes the need to exercise that jurisdiction with due regard for governmental efficiency. The Court should explicitly identify and balance these competing separation-of-powers principles in its standing, mootness, ripeness, and political question decisions.

CONCLUSION

The Justices who developed the jurisprudence on justiciability and separation of powers over the first two-thirds of this century can perhaps be forgiven for getting it wrong. They were products of an era that devalued Federalist ideas as unimportant both to the Framers themselves (whose true motivations were allegedly economic) and to modern American government.[576] Consequently, serious consideration of Federalist concepts in formulating the justiciability doctrines might have seemed a waste of effort; vague assertions would suffice.

The members of the Burger and Rehnquist Courts have no such excuse. Since the late 1960s, several monumental works of history,[577] political science,[578] and legal history[579] have demonstrated that the

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576 *See supra* part II.A.1-2.

577 In 1969, Gordon Wood published his pathbreaking intellectual history of the creation of the American republic. *See* WOOD, *supra* note 25. Wood built upon the work of a few skeptics who had challenged the prevalent economic interpretation of the American Constitution, and his book sparked a significant reanalysis of the importance of Federalist thought in American history. For a good bibliography, see ACKERMAN, *supra* note 13, at 347-52.

578 Garry Wills has provided especially keen insights about Federalist political science in a series of books beginning in the 1970s. *See, e.g.*, WILLS, *supra* note 42. More specifically, the two leading studies on separation of powers were published in the mid-to-late 1960s. *See* GWYN, MEANING, *supra* note 21; VILE, *supra* note 21.

579 In 1971, Julius Goebel published his seminal work on the Supreme Court's early history. *See* GOEBEL, *supra* note 66. In 1985, a valuable compilation of Court records from 1789-1800 (many previously unpublished) appeared. *See* DOCUMENTARY HISTORY, *supra* note 15. Maeva Marcus, who edited this project, bas used these sources to support her reinterpretations of key Federalist justiciability cases. *See, e.g.*, Marcus, *supra* note 192 (analyzing numerous jurisdictional decisions from the 1790s); Marcus & Teir, *supra* note 213 (examining *Hayburn's Case*); Bloch & Marcus, *supra* note 215 (discussing *Marbury*). Finally, in the mid-1980s, several legal scholars began to demonstrate the relevance of Federalist thought to modern legal problems. *See, e.g.*, ACKERMAN, *supra* note 13; Amar, *Sovereignty*, *supra* note 13.

Federalists created a unique political theory that has continuing vitality. A Court professedly committed to "original intent" jurisprudence[580] must incorporate this genuine Federalist understanding into its justiciability doctrines.

580 The Justices have consistently maintained that their justiciability doctrines reflect the Framers' ideas. *See supra* note 1 (collecting cases). Similarly, several recent separation-of-powers decisions have relied heavily upon the need to preserve the Founders' design. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 721-27 (1986); INS v. Chadha, 462 U.S. 919, 944-51, 955-59 (1983).